TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 148.

GEORGE H. SCOTT, PLAINTIFF IN ERROR,

vs.

PARRY L. DEWEESE (SUBSTITUTED FOR W. A. LATIMER), RECEIVER OF THE FIRST NATIONAL BANK OF SEDALIA, MISSOURI.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 22, 1900.

(17,540.)

(17,546.)

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INDEX.

	Original.	Print.
Caption to transcript from United States circuit court of appeals	a	1
Writ of error and clerk's return	1	1
Citation and acknowledgment of service	2	2
Transcript from United States circuit court, western district of Missouri	3	3
Petition	3	3
Appearance of defendant	6	6
Order: Cause continued	6	6
Judgment, October 20, 1896	6	6
Stipulation waiving jury	7	7
Order setting aside judgment, etc	7	7
Stipulation to set aside judgment, etc	8	8
Answer	8	8
Judgment, April 20, 1897	12	11
Order granting time for defendant to file bill of exceptions	12	12
Record entry of filing of bill of exceptions	13	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 16, 1900.

	Original.	Print
Bill of exceptions	13	12
Plaintiff's motion for judgment on the pleadings	13	13
Defendant's exception to court's ruling on motion for judgment	14	13
Certificate of judge to bill of exceptions	14	13
Order appointing Judge Adams to hold court	14	13
Record entry of filing of assignment of errors	15	14
Assignment of errors	15	14
Record entry of filing of bond on writ of error	16	15
Order allowing writ of error and approving bond	16	15
Bond on writ of error	16	15
Clerk's certificate to transcript	18	17
Appearance of counsel for plaintiff in error	19	17
Appearance of counsel for defendant in error	19	17
Order: Cause submitted	20	18
Opinion of United States circuit court of appeals	21	19
Judgment of United States circuit court of appeals	43	41
Certified copy of stipulation and order of substitution in circuit court	43	42
Stipulation for substitution of P. L. Deweese as defendant in error	45	43
Order of substitution	46	44
Bond on writ of error	47	45
Assignment of errors	51	47
Petition for writ of error	52	49
Writ of error and clerk's return	55	50
Citation and acknowledgment of service	57	51
Clerk's certificate to transcript	58	52

a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the second day of May, A. D. 1898, before the Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges, and Honorable Oliver P. Shiras, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-sixth day of November, A. D. 1897, a transcript of record, in pursuance of a writ of error directed to the circuit court of the United States for the western district of Missouri, was filed in the clerk's office of said circuit court of appeals in a certain cause wherein George H. Scott was plaintiff in error and W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, was defendant in error; which said transcript of record is in the words and figures following:

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the central division of the western district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1897, thereof, between W. A. Latimer, receiver of the First National Bank of Sedalia, Mo., plaintiff, and George H. Scott, defendant, a manifest error hath happened, to the great damage of the said George H. Scott, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the clerk of the said United States circuit court of appeals for the eighth circuit, on or before the 30th day of November, A. D. 1897, to the end that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals for the eighth circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of September, in the year A. D. 1897. Issued at office, in Jefferson City, Missouri, with the seal of the said circuit court and dated as aforesaid.

H. C. GEISBERG, *Clerk.*

Allowed by—
JNO. F. PHILIPS, *Judge.*

No. 2170. United States circuit court, western district of Missouri, central division. W. A. Latimer, receiver, *vs.* Geo. H. Scott. Writ of error.

2 UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, Central Division, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, a duly certified transcript of the record and proceedings in the within-entitled cause, together with all things concerning the same.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

In testimony whereof I have hereunto set my hand, and affixed the seal of the circuit court of the United States for the central division of the western district of Missouri, at office in the city of Jefferson, Missouri, this 5th day of November, A. D. 1897.

H. C. GEISBERG, *Clerk.*

United States of America to W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the central division of the western district of Missouri, wherein George H. Scott is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John F. Philips, judge of the circuit court of the United States for the central division of the western district of Missouri this 30th day of September, 1897.

JNO. F. PHILIPS, *Judge.*

UNITED STATES OF AMERICA,
Western District of Missouri, Central Division, } *ss:*

I hereby acknowledge due service of the within citation, this 2d day of November, A. D. 1897.

WM. S. SHIRK,
Attorney for Defendant in Error.

No. 2170. United States circuit court, western district of Missouri, central division. W. A. Latimer, receiver, *vs.* Geo. H. Scott. Citation.

3 UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } *sct:*

Pleas before the honorable circuit court of the United States in and for the central division of the western district of Missouri, at the March term, A. D. 1897, thereof, in the case of—

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Missouri, Plaintiff,
vs.
GEORGE H. SCOTT, Defendant. } 2170.

Be it remembered that heretofore to wit, on the 10th day of September, 1895, there was filed in the clerk's office of the circuit court of the United States for the central division of the western district of Missouri, a petition, in words and figures following, to wit:

Petition.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, October Term, A. D. 1895.

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Mo., Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

Now comes W. A. Latimer, plaintiff in the above-entitled cause and complaining of George H. Scott defendant herein says, that on the 30th day of October, A. D. 1865, the First National Bank of Sedalia, Missouri, became incorporated and organized with a capital stock of $100,000, at Sedalia, Missouri, within the central division of the western district of Missouri, under the corporate name of the First National Bank of Sedalia, Missouri, under and in pursuance of an act of the Congress of the United States entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, A. D. 1864, and from that time until the 24th day of October, A. D. 1885, continued to do a banking business as such national bank at the city of Sedalia, county of Pettis, and State of Missouri.

That on said 24th day of October, A. D. 1885, the said First Na-

tional Bank of Sedalia, Mo., did extend the period of its succession as named in its articles of association, under and in pursuance of an act of the Congress of the United States entitled "An act to
4 enable national banking associations to extend their corporate existence, and for other purposes," approved July 12th, A. D. 1882, for a term of twenty years from the expiration of the period of succession named in its articles of association, to wit: twenty years from the 30th day of October, A. D. 1885, and that on said 24th day of October, A. D. 1885, the Comptroller of the Currency of the United States issued his certificate to the said First National Bank of Sedalia, Missouri, that it had complied with all the provisions of the act of the Congress of the United States aforesaid, to extend its period of existence for the period of twenty years as aforesaid, and did authorize said bank to have succession until the close of business on the 30th day of October, A. D. 1905.

That the said First National Bank of Sedalia Missouri, from and after the said 24th day of October, A. D. 1885, until the time hereinafter mentioned, continued to do a banking business as such national banking association at the said city of Sedalia, Missouri.

That on the 6th day of September, A. D. 1890, the said First National Bank of Sedalia, Missouri, in pursuance of and under the provisions of the acts of the Congress of the United States with reference to national banks, increased its capital stock in the sum of one hundred and fifty thousand dollars ($150,000.00), and that on the 17th day of January, A. D. 1891, the Comptroller of the Currency of the United States did certify that the said First National Bank of Sedalia, Mo., had increased its capital stock in the sum of one hundred and fifty thousand dollars, in accordance with the provisions of said act of the Congress of the United States, approved May the 1st, A. D. 1886, and did approve the said increase of its capital stock and did certify that it had been duly paid in as part of the capital of such association, and that thereafter the said First National Bank, of Sedalia, Missouri, did continue to do a banking business at the said city of Sedalia, Mo., with a capital stock of two hundred and fifty thousand dollars ($250,000.00), until the 4th day of May, A. D. 1894, hereinafter mentioned.

Plaintiff further states that on said 4th day of May, A. D. 1894, the said First National Bank of Sedalia, Missouri, became insolvent and failed and closed its doors and ceased to do business, and that on the 10th day of May, A. D. 1894, the plaintiff, W. A. Latimer, was duly appointed receiver of said First national bank by the Comptroller of the Currency of the United States, under the provisions and in pursuance of the laws of the United States, known as the "National banking acts." That he has duly qualified as such receiver, and is engaged in winding up the affairs of said bank, and as such receiver and officer, and in the discharge of his duties as such receiver, he brings this suit.

5 And plaintiff further states, that in winding up and settling the affairs of said bank, for the purpose of paying the debts of said association, the Comptroller of the Currency of the United States determined that it was necessary to enforce the individual

liability of the stockholders thereof, and to collect from them an amount equal to 75 per cent. of the amount of their stock held in said bank at par value, and that on the 13th day of April, A. D. 1895, the said Comptroller of the Currency of the United States, acting under the laws of the United States, aforesaid, duly made an assessment and requisition upon the shareholders of said First National Bank of Sedalia, Missouri, for the sum of one hundred and eighty-seven thousand five hundred dollars ($187,500.00), to be paid by them ratably, on or before the 15th day of May, A. D. 1895, and did then make demand upon the said George H. Scott, defendant herein, for seventy-five dollars, upon every share of the capital stock of the said First National Bank of Sedalia, Missouri, held or owned by said defendant at the time of the failure of said First national bank as aforesaid, payable on or before the said 15th day of May, A. D. 1895, and did direct the plaintiff, W. A. Latimer, as receiver as aforesaid, to enforce the payment of said amount.

Plaintiff further states that at the time of the failure and suspension of said bank as aforesaid, the defendant herein was the owner and holder of fifty shares of the capital stock of the said First National Bank of Sedalia, Missouri, of the par value of one hundred dollars ($100.00) per share each; that the amount ratably due by said defendant as such shareholder under the assessment made by the Comptroller of the Currency aforesaid, for the settlement of the contracts, debts and liabilities of said banking association is three thousand seven hundred and fifty dollars, and that by the virtue of the assessment and requisition of the Comptroller of the Currency of the United States as aforesaid, the defendant became and is liable under the provisions of the law aforesaid for the payment of said sum.

That on or about the 17th day of April, A. D. 1895, the plaintiff, W. A. Latimer, as receiver of said First national bank aforesaid, notified the defendant herein of the assessment and requisition of the Comptroller of the Currency of the United States aforesaid, and demanded the payment of the said sum on or before the said 15th day of May, A. D. 1895, but that the defendant herein has not paid said sum or any part thereof.

Wherefore, plaintiff as such receiver of the said First National Bank of Sedalia, Missouri, prays judgment against the de-
6 fendant for the said sum of $3,750, together with 6 per cent. interest thereon from the said 15th day of May, A. D. 1895, as well as for his costs herein laid out and expended.

WM. S. SHIRK,
Attorney for Plaintiff.

Upon said petition appears the following waiver of process and entry of appearance, to wit:

Appearance.

U. S. OF AMERICA,
Western District of Western Division of Missouri.

I, George H. Scott, the defendant named in the within petition, do hereby enter my appearance to said action, and I do hereby waive the issue of process upon said petition, as well also as the service of the same upon me by a United States marshal.

Witness my hand this — day of September, A. D. 1895.

GEO. H. SCOTT.

And afterwards, at a regular stated term of said circuit court, begun and held at the city of Jefferson, in said district, on the third Monday of March, A. D. 1896, the following proceedings were had in this cause on the 24th day of March, A. D. 1896, to wit:

Continuance.

W. A. LATIMER, Receiver,
vs.
GEORGE H. SCOTT. } 2170.

By consent of counsel, this cause is continued until the next term of this court.

And afterwards, at the October term, A. D. 1896, of said circuit court, begun and held on the third Monday of October, A. D. 1896, the following further proceedings were had in said cause on the 20th day of October, A. D. 1896, to wit:

Submission and Judgment.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Mo.,
vs.
GEORGE H. SCOTT. } 2170.

This day comes the plaintiff by his attorney, Wm. S. Shirk, Esq., and the defendant by his attorney, W. M. Williams, Esq., when a jury waiver is filed, cause tried by the court sitting as a jury,
7 evidence heard, cause submitted on pleadings and proofs; on consideration whereof, the court finds for the plaintiff and assesses the damages by him sustained at the sum of ($4,068.75) four thousand and sixty-eight dollars and seventy-five cents. It is therefore now considered that the plaintiff W. A. Latimer, receiver of the First National Bank of Sedalia, Mo., recover of and from the defendant, George H. Scott, the said sum of four thousand and sixty-eight dollars and seventy-five cents ($4,068.75), the damages so as aforesaid by the court assessed, together with his costs herein laid out and expended, and that (—) have execution thereof.

Note on margin of the record:

MEMO.—This judgment was set aside, April 19th, 1897. See order page 214, of this record. H. C. Geisberg, clerk.

The jury waiver filed as aforesaid is in words and figures as follows, to wit:

Jury Waiver.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, October Term, 1896.

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Mo., Plaintiff,
vs.
GEO. SCOTT, Defendant. } (2170.)

Come now the parties to the above-entitled cause by their respective attorneys, and waive a trial in this cause by jury and agree that the same may be heard by the court.

WM. S. SHIRK,
Att'y for Plaintiff.
W. M. WILLIAMS,
Att'y for Defendant.

And afterwards, at the March term, A. D. 1897, of said circuit court, begun and held on the third Monday of March, A. D. 1897, the following further proceedings were had in said cause on the 19th day of April, A. D. 1897, to wit:

Former Judgment Set Aside; Case Redocketed; Leave to Amend Petition; Answer and Motion for Judgment Filed; Motion Submitted.

W. A. LATIMER, Receiver,
vs.
GEORGE H. SCOTT. } 2170.

This day comes the plaintiff by his attorney, Wm. S. Shirk, Esq., on whose motion, and in accordance with a stipulation by counsel this day filed, it is ordered that the judgment heretofore ren-
8 dered in this cause be set aside, and said cause be reinstated on the docket. And on further motion of the plaintiff, leave is granted him to amend his petition by interlineation, and such amendment having been made, the defendant files his answer, and plaintiff files a motion for judgment upon the pleading, which motion is by the court taken under advisement.

Which stipulation so filed is in words and figures as follows, to wit:

Stipulation to Set Aside Judgment, etc.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, March Term, A. D. 1897.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Mo., Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

Whereas judgment was rendered in the above-entitled cause at the October term, A, D. 1896, of this court, through a misunderstanding between the plaintiff and the defendant, and the plaintiff being willing that the defendant should have a trial of his case upon the merits—

It is therefore hereby stipulated and agreed, by and between the parties hereto, that an order may be entered herein, reinstating this cause upon the docket, and setting aside the judgment heretofore rendered herein by default, and that the defendant shall have leave to file his answer herein, on the 1st day of the next term of this court.

In witness whereof, the undersigned attorneys for plaintiff and defendant have hereunto set their hands, this the 19th day of March, 1897.

WM. S. SHIRK,
Att'y for Plaintiff.
W. M. WILLIAMS,
Att'y for Defendant.

Which answer, filed as aforesaid is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Missouri, Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

9 Defendant answering the complaint of plaintiff herein, admits the incorporation of the First National Bank of Sedalia, Missouri, as alleged in the complaint, and the extension of the period of its incorporation as therein alleged, and that it continued to do a banking business as such corporation during the time and at the place in the complaint alleged, and that said corporation became insolvent and failed and closed its doors. Defendant admits that plaintiff was appointed receiver of said corporation on May 10th, 1894, as alleged in the complaint, and that he

has duly qualified as such receiver; and admits that in the winding up and settling of the affairs of said bank, the Comptroller of the Currency determined that it was necessary to enforce the individual liability of the stockholders thereof, and to collect from them ratably, the amount of seventy-five per cent. of the par value of the stock held by them in said bank, and that a demand was made and a direction given to plaintiff as stated in the complaint.

Further answering, defendant alleges that on September 6th, 1890, said bank, by a vote of the owners of two-thirds of the capital stock of said bank, voted to increase said capital stock by the sum of one hundred and fifty thousand ($150,000.00) dollars; that said bank notified the Comptroller of the Currency that the whole amount of said increase had been paid in, and that on January 17th, 1891, said comptroller (who then knew that more than the entire capital of said bank was loaned, directly and indirectly, to its president, and that the amount so loaned had been constantly increasing for several years up to said January 17th, 1891, by adding the interest which was not paid to the notes evidencing said loans or the renewals thereof, and who based his action wholly upon the notification from said bank) issued his certificate, stating that the amount of the increase of capital was one hundred and fifty thousand ($150,000.00) dollars, and that the same was paid in and did approve the said increase of its capital stock.

That thereafter and until May 4th, 1894, said bank continued to do business with a pretended capital of two hundred and fifty thousand ($250,000.00) dollars.

Defendant further alleges that in September, 1890, the officers of said bank informed and represented to defendant as follows: That said bank contemplated increasing its capital stock from one hundred thousand ($100,000.00) dollars to two hundred and fifty thousand ($250,000.00) dollars. That said intended increase of capital was made desirable on account of the increasing business of said bank; that said bank was in a flourishing condition and earning large dividends upon its capital stock, and then had a surplus of fifty thousand ($50,000.00) dollars over and above its capital stock and all liabilities; that from said surplus such dividends would be declared as would make each of the two thousand five hundred (2,500) shares of stock worth the sum of one hundred and eight ($108) dollars.

And defendant alleges that relying upon the representations made as aforesaid, defendant who in no other way ever held or owned any stock in said bank, subscribed for fifty shares of said proposed increase of the one hundred and fifty thousand ($150,000) (—) and in October, 1890, deposited in said bank the sum of five thousand four hundred ($5,400.00) dollars, and it was then and there the understanding between defendant and said bank that said sum of fifty-four hundred ($5,400.00) dollars was to be held by said bank, and applied in payment of defendant's subscription for said fifty shares, when all of said proposed increase was subscribed for and the money therefor paid in to said bank, and the issues of the shares of said increase could be legally made; that said bank gave

to defendant a receipt for said sum of five thousand four hundred ($5,400.00) dollars; that about October 25th, 1890, said bank delivered to plaintiff a certificate for fifty (50) shares of its said pretended increase of capital. That said bank then, falsely and fraudulently and with intent to deceive defendant, represented to defendant that the said increase of capital had been lawfully made, and that the full amount thereof had been subscribed for and paid in in full, and defendant, deceived by said representations, and relying thereon, accepted and retained said certificate, and that defendant held and claimed as owner, said certificate thereafter and until the closing of said bank, and in the years 1891 and 1892 received and retained alleged dividends aggregating eighteen per cent. of the par value of said certificate; that said alleged dividends were paid out of the money paid as aforesaid by defendant to said bank.

And defendant further alleges, that as a matter of fact, in September, 1890, and for many months prior thereto and ever afterwards said bank was wholly insolvent and had no surplus whatever, and at the time said pretended increase of capital was made, all of the capital of said bank had been lost, and its liabilities irrespective of its capital stock and alleged surplus, exceeded its assets, and the bank was earning no dividends upon its capital, and said pretended increased stock was never of any value or validity whatever, and only about two-thirds of said increase was ever paid in, and the officers of said bank made false entries in the books and records of said bank, for the purpose of showing an apparent
11 surplus in the bank's assets, and declared a dividend to themselves therefrom, and turned in said dividend to the bank in pretended payment for a large part of said increased stock, and the whole transaction was a sham, and was done for the purpose of bolstering up an insolvent institution, by obtaining large sums of money from the subscribers for the increased stock, and for the further purpose of watering the capital stock of said bank and permitting the officers thereof to appropriate to themselves, without paying anything therefor, a large part of said pretended increase, of all of which defendant had no knowledge whatever, until long after said bank had closed its doors on May 4th, 1894, nor had defendant any information whatever that could in any way have created a suspicion thereof. Defendant further alleges that the books and records of said bank during all the time after said October 25th, 1890, have shown, and it has been made by them to appear that all of said pretended increase of capital was paid in. That from a time prior to said October 25th, 1890, until said bank closed, the books and records of the bank were systematically, skilfully and cunningly falsified by said officers, and so kept that the defendant could not by the utmost diligence ascertain the true condition of said bank.

That defendant, as soon as he discovered that said increase of stock was not fully paid in, disclaimed and denied that he was or ever had been a stockholder of said bank.

Except as hereinbefore admitted or qualified, the defendant denies

the said complaint and each and every matter, allegation, statement and thing therein contained, and each and every part thereof.

Wherefore, defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed with his costs.

STEVENS, O'BRIEN, COLE AND
ALBRECHT, HAYDN S. COLE,
Attorneys for Defendant.

STATE OF MISSOURI, } ss:
County of Pettis, }

George H. Scott, being duly sworn deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which
12 are therein stated upon information and belief, and that as to those matters that he believes it to be true.

GEORGE H. SCOTT.

Subscribed and sworn to before me this 13th day of February, 1897.

[SEAL.] HARMON R. SCOTT,
Notary Public, Pettis County, Missouri.

My com. expires June 1st, 1898.

And afterwards, at said last-mentioned term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said cause on the 20th day of April, A. D. 1897, to wit:

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Mo., } 2170.
vs.
GEORGE H. SCOTT.

Answer Amended by Leave; Motion Sustained and Judgment.

This day comes the plaintiff by W. S. Shirk, Esq., his attorney, and the defendant by his attorney, W. M. Williams, Esq., when defendant, by consent, amends his answer by interlineation, and the court having considered the motion to enter judgment on the pleadings, it is ordered that said motion be sustained; and the court being of the opinion that the allegations set up in defendant's answer are no defense to the plaintiff's cause of action, the court finds that the defendant is indebted to the plaintiff on the cause of action set out in the petition, in the sum of four thousand one hundred and eighty-one and $\frac{87}{100}$ dollars ($4,181.87). It is therefore considered by the court that the plaintiff, W. A. Latimer, receiver of the First National Bank of Sedalia, Mo., have and recover of and from the defendant, George H. Scott, the sum of four thousand one hundred and eighty-one dollars and eighty-seven cents ($4,181.87), the amount so as aforesaid found to be due, together with the costs herein expended, and that execution issue therefor.

And afterwards, at said last-mentioned term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said cause on the said 20th day of April, A. D. 1897, to wit:

W. A. LATIMER, Receiver,
vs.
GEORGE H. SCOTT. } 2170.

Leave to File Bill of Exceptions.

On motion of defendant leave is granted him to file his bill of exceptions within ten days from this date.

13 And afterwards, on the 30th day of June, A. D. 1897, it being in vacation of the said circuit court, the following further proceedings were had in said cause, to wit:

W. A. LATIMER, Receiver, etc.,
vs.
GEORGE H. SCOTT. } 2170.

Bill of Exceptions Filed.

This day comes the defendant by his attorney, and files his bill of exceptions in this cause, which is signed by Hon. Elmer B. Adams, who presided at the trial; and is ordered to be filed and made part of the record herein. Memo. by clerk: This bill of exceptions was in fact filed April 22, 1897, but by inadvertence omitted from the record, and therefore the above entry is made *nunc pro tunc* as of said last-named date.

Which bill of exceptions filed as aforesaid is in words and figures as follows, to wit:

In the Circuit Court of the United States, Central Division of Western District of Missouri, March Term, 1897.

W. A. LATIMER, Receiver of the First National Bank of Sedalia,
Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

Bill of Exceptions.

Be it remembered that at the March term, 1897, and on the 19th day of April, 1897, the plaintiff filed a motion for judgment notwithstanding the answer in words and figures as follows, to wit:

Which motion is as follows, to wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, March Term, A. D. 1897.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Mo., Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

Motion for Judgment.

Comes now the plaintiff herein by his undersigned attorney of record, and moves the court to render judgment in his favor upon the pleadings herein, for the following reasons, to wit:

1st. Because upon the pleadings the plaintiff is entitled to a judgment as prayed for in his petition.

14 2nd. Because defendant's answer filed herein, admits all the facts alleged in plaintiff's petition, which constitute the plaintiff's cause of action, and the allegations of new matter in said answer contained, do not constitute any defense whatever to the cause of action alleged in said petition.

3rd. Because the plaintiff is entitled to judgment as prayed for in his petition, upon the statements and admissions of the defendant's answer filed herein.

WM. S. SHIRK,
Att'y for Plaintiff.

Which said motion was on the 20th day of April, 1897, sustained by the court and to the ruling of the court in sustaining said motion the defendant at the time duly excepted and now tenders this his bill of exceptions and prays that the same be signed and sealed by the court and made part of the record which is accordingly done this 21st day of April, 1897.

ELMER B. ADAMS, *Judge.* [SEAL.]

The following is the order appointing the Hon. Elmer B. Adams, United States district judge for the eastern district of Missouri, to hold and assist in holding the United States circuit and district courts in the western district of Missouri.

Order Appointing Judge Adams to Hold Court in Western District.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In my judgment the public interests require the designation and appointment of a district judge of this circuit to hold and assist in holding the circuit and district courts of the United States for the western district of Missouri, in place and in aid of the district judge of that district. I do, therefore, by these presents designate and appoint the Honorable Elmer B. Adams, United States district judge for the eastern district of Missouri, to hold or assist in holding the circuit and district courts of the United States in and for the several divisions of the western district of Missouri, at the times and

places appointed by law for holding said courts, from the date hereof until the 1st day of July, A. D. 1897, in place and in aid of the Honorable John F. Philips, United States district judge for the said western district of Missouri.

Witness my hand and seal this 17th day of October, A. D. 1896.

AMOS M. THAYER,
Circuit Judge.

15 And afterwards, on the 29th day of September, A. D. 1897, it being in vacation of the said circuit court, the following further proceedings were had in said cause, to wit:

W. A. LATIMER, Receiver, etc.,
vs.
GEORGE H. SCOTT. } 2170.

This day comes the defendant, by his attorney and files an assignment of errors herein:

Which assignment of errors so filed is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Missouri, Plaintiff, Defendant in Error,
vs.
GEORGE H. SCOTT, Defendant, Plaintiff in Error.

Assignment of Errors.

In the above-entitled proceedings in error from the circuit court of the United States for the central division of the western district of Missouri, the plaintiff in error makes the following assignment of errors:

First. That the court erred in rendering judgment on the pleadings in favor of the plaintiff, defendant in error, and against the defendant, plaintiff in error.

Second. That the court erred in holding that the facts alleged in the answer did not constitute any defense to the cause of action stated in the petition, and that the answer admitted all the facts alleged in the petition which constitute the plaintiff's cause of action.

Wherefore, the plaintiff in error asks and prays that your honorable court of appeals of the eighth circuit of the United States reverse the judgment in this action.

STEVENS, O'BRIEN, COLE AND ALBRECHT,
HAYDN S. COLE,
H. F. STEVENS,
Attorneys for Plaintiff.

16 And afterwards, on the 30th day — September, A. D. 1897, it being in vacation of the said circuit court, the following further proceedings were had in said cause, to wit:

W. A. LATIMER, Receiver, etc.,
vs.
GEORGE H. SCOTT. } 2170.

This day there is filed an appeal bond in this case and an order in words and figures following, to wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, in Vacation,

W. A. LATIMER, Receiver of the First National Bank,
Plaintiff,
vs.
GEORGE H. SCOTT, Defendant. } 2170.

Writ of Error Allowed; Bond Approved.

This day comes the defendant and presents to the court a writ of error to reverse the judgment heretofore rendered against him, a citation directed to the plaintiff, and an appeal bond, whereupon the said writ of error is allowed, citation signed, and it is ordered that the appeal bond be approved and filed and made a part of the record in this cause.

Kansas City, Mo., Sept. 30th, 1897.

JNO. F. PHILIPS, *Judge.*

Which appeal bond filed as aforesaid is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Plaintiff, Defendant in Error,
vs.
GEORGE H. SCOTT, Defendant, Plaintiff in Error.

Appeal Bond.

Know all men by these presents, that we, George H. Scott, as principal, and Harmon R. Scott, as sureties, are held and firmly bound unto W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, in the sum of two hundred and fifty ($250) dollars to be paid to the said W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, and which payment well and truly to be made, we bind ourselves, our heir, executors, and administrators jointly and severally by these presents.

Witness our hands and seals this 23rd day of September, 1897.

17 The conditions of the above obligation are such, that whereas, at the April, 1897, adjourned term of the March, 1897 term of the circuit court of the United States for the central division of the western district of Missouri, in a suit wherein W. A. Latimer as receiver of the First National Bank of Sedalia, Missouri, was plaintiff and George H. Scott was defendant, a judgment was rendered in favor of said plaintiff and against said defendant who has obtained a writ of error from said court and a citation directed to the said W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, citing and admonishing him to be and appear in the United States court of appeals of the eighth circuit sixty days after the date of said citation.

Now therefore, if the said defendant George H. Scott, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good said appeal then this obligation to be void, otherwise to be and remain of full force and effect.

GEO. H. SCOTT. [SEAL.]
HARMON R. SCOTT. [SEAL.]

Signed, sealed and delivered in presence of—
CHARLES VAN ANTWERP.

STATE OF MISSOURI, } ss:
County of Pettis, }

Be it known, that on this 23 day of September, A. D. 1897, before me personally appeared Geo. H. Scott and Harmon R. Scott, to me known to be the same persons described in and who executed the foregoing bond, and each for himself acknowledged the same to be his own free act and deed.

CHARLES VAN ANTWERP,
Notary Public.

STATE OF MISSOURI, } ss:
County of Pettis, }

Geo. H. Scott and Harmon R. Scott, the sureties named in and who executed the foregoing bond, being first duly sworn doth each for himself depose and say, that he is a resident and freeholder of the State of Missouri and worth the amount of five hundred dollars, above his debts and liabilities, and exclusive of his property exempt from execution.

—— ——. [SEAL.]

Subscribed and sworn to before me this 23rd day of September, 1897.

CHARLES VAN ANTWERP,
Notary Public.

My term expires April 13th, 1899.

The above bond approved:
JNO. F. PHILIPS, *Judge.*

18 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Western District of Missouri,* } *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for the central division of the western district of Missouri, do hereby certify that the foregoing writing is a full, true and complete transcript of the record and proceedings in the cause wherein W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, is plaintiff, and George H. Scott is defendant (No. 2170) as fully as the same remain on file and of record in my office.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in the city of Jefferson, in said district, this 5th day of November, A. D. 1897.

H. C. GEISBERG, *Clerk.*

Filed Nov. 26, 1897.

JOHN D. JORDAN, *Clerk.*

19 (*Appearance for Plaintiff in Error.*)

And on the third day of December, A. D. 1897, an appearance of counsel for the plaintiff in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

GEORGE H. SCOTT, Plaintiff in Error, *vs.* W. A. LATIMER, Receiver, &c. } No. 1026.

The clerk will enter our appearance as counsel for the plaintiff in error.

STEVENS, O'BRIEN, COLE & ALBRECHT.

H. F. STEVENS.
HAYDN S. COLE, *Counsel.*

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1897. No. 1026. George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver, &c. Appearance. Filed Dec. 3, 1897. John D. Jordan, clerk. H. F. Stevens, Haydn S. Cole, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the twenty-second day of December, A. D. 1897, an appearance of counsel for the defendant in error was filed in the

clerk's office of said circuit court of appeals, in said cause, in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver, &c. } No. 1026.

20 The clerk will enter my appearance as counsel for the defendant in error.

WM. S. SHIRK,
Att'y for Def't in Error.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1897. No. 1026. George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver, &c. Appearance. Filed Dec. 22, 1897. John D. Jordan, clerk. William S. Shirk, counsel for def't in error.

(*Order of Submission.*)

And on the tenth day of May, A. D. 1898, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause, in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1898.

TUESDAY, *May* 10, 1898.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri. } No. 1026.

In error to the circuit court of the United States for the western district of Missouri.

This cause, having been called for hearing in its regular order, was argued by Mr. H. F. Stevens, for plaintiff in error, and submitted on briefs by defendant in error.

Thereupon the cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the third day of October, A. D. 1898, an opinion of said United States circuit court of appeals was filed in the clerk's office of said court in the following words, to wit:

21 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1898.

GEORGE H. SCOTT, Plaintiff in Error, *vs.* W. A. LATIMER, Receiver of the National Bank of Sedalia, Missouri, Defendant in Error. | No. 1026. In Error to the Circuit Court of the United States for the Western District of Missouri.

Mr. H. F. Stevens (Mr. John D. O'Brien, Mr. Haydn S. Cole and Mr. Armand Albrecht were with him on the brief) for plaintiff in error.

Mr. William S. Shirk filed brief for defendant in error.

Before Sanborn and Thayer, circuit judges, and Shiras, district judge.

This action was brought in the United States circuit court for the western district of Missouri, by W. A. Latimer, receiver of the First National Bank of Sedalia to recover from George H. Scott, an assessment made by the Comptroller of the Currency upon the capital stock of the named bank, it being claimed that Scott owned and held fifty shares of the stock. In the answer filed it was admitted that the bank had been duly incorporated in 1865; that it closed its doors and was put in liquidation in May, 1894, the plaintiff, Latimer, being appointed receiver on May 10th, 1894; that the comptroller had determined that it was necessary to enforce the individual liability of the stockholders in favor of the creditors, and to that end had made an assessment of seventy-five per cent. upon the stock held in the bank, and that payment thereof had been demanded of the defendant, Scott. As matters of defense it was averred in the answer that on September 6, 1890, the bank, by a vote of the owners of two-thirds of the capital stock, voted to increase the capital from $100,000 to $250,000; that said bank notified the comptroller that the whole amount of said increase had been paid in, and on January 17, 1891, the comptroller, basing his action wholly upon the notification from the bank, issued his certificate stating that the amount of the increase was $150,000 and that the same was paid in and was approved by him as comptroller.

It is further averred that in September, 1890, the officers of the bank represented to the defendant, Scott, that the bank proposed to increase its capital stock by the addition thereto of $150,000;

22 that this increase was made desirable on account of the increasing and flourishing condition of the business of the bank, which was earning large dividends and had a surplus then earned which would make the shares, including the proposed increase, worth $108 per share; that relying upon these representations the defendant subscribed for fifty shares of the proposed increase, and in October, 1890, deposited in the bank the sum of $5,400, it being then and there the understanding between defendant and the bank that said sum, so deposited, was to be held by the bank and applied in payment of defendant's subscription for fifty shares, when all the proposed in-

crease was subscribed and paid for; that about October 25, 1890, the bank, with intent to deceive defendant, falsely represented that the whole amount of the proposed increase of the capital stock had been subscribed and paid in, and thereupon issued to defendant a certificate for the fifty shares of stock by him subscribed for; that defendant, relying upon these representations, accepted the certificate and held and claimed the same as owner until after the closing of the bank, and in the years 1891 and 1892 received and retained alleged dividends amounting to eighteen per cent.; that as a matter of fact in September, 1890, and for many months prior thereto and ever afterwards the bank was insolvent, its liabilities exceeding its assets; that only about two-thirds of the proposed increase of the capital stock was ever paid in; that the officers of the bank made false entries on the books for the purpose of showing an apparent surplus and declared a dividend thereon, turning in the same in pretended payment of a large part of said increased stock; that the whole transaction was a sham and fraud, of which the defendant had no knowledge until after the bank closed its doors in May, 1894; that the books of the bank were so kept that the defendant could not by the utmost diligence ascertain the true condition of the bank and that as soon as defendant discovered that the increase of stock was not fully paid in, he disclaimed that he was or ever had been a stockholder in the bank.

Upon the filing of this answer, the plaintiff, Latimer, moved for judgment in his favor on the pleadings on the ground that the answer admitted all the facts necessary to sustain his action in the first instance, and that the matters set up as a defense were insufficient to defeat the claim sued on. The court held the motion to be well taken and gave judgment accordingly, and thereupon the case was brought to this court by writ of error, it being contended by the plaintiff in error that the facts averred in the answer showed that there had not been a valid increase of the capital stock, because the whole amount of the proposed increase of $150,000 had not been paid in, and further, that the facts averred in the answer entitled the defendant, upon discovery thereof, to rescind the contract of subscription on the ground of false and fraudulent representations made to him by the officers of the bank.

SHIRAS, district judge, after stating the case as above, delivered the opinion of the court:

From the foregoing statement of facts it appears that the plaintiff in error relies upon two distinct grounds of defense to the claim asserted by the receiver, the one being that the plaintiff in error
23 never was a stockholder in the bank because the whole amount of the proposed increase of the capital stock was not in fact paid in to the bank, and the other being that the plaintiff in error is entitled to rescind the contract by which he became a purchaser of stock in the bank for two reasons: First, because his subscription was conditioned upon the payment in full of all the proposed increase of stock, and second, because he was induced to

purchase the stock through fraudulent representations as to the pecuniary condition of the bank.

In support of the first defense it is contended that the fifty shares of stock subscribed for by the plaintiff in error were not valid shares because some of the shares subscribed for by other parties were not in fact paid for. This contention is based upon the provisions of section 5142, R. S., which are as follows:

"Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association, shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association."

The theory of the plaintiff in error is that under the provisions of this section no share of a proposed increase of the capital stock can become a valid share unless all the shares of the proposed increase are subscribed for and are paid up in full, or in other words, if the shereholders should determine, with the approval of the Comptroller of the Currency, to increase the capital stock by the sum of $100,000 or one thousand shares of $100 each, and the entire number should be subscribed for and all the shares except one, should be fully paid for, and certificates should be duly issued therefor, the holders of such full-paid shares cannot be held to be stockholders because another person has failed to pay up one share by him subscribed for.

It cannot be denied that if the words, "and no increase of capital shall be valid until the whole amount of such increase is paid in" found in section 5142 are construed literally, support would be given to the contention of counsel for plaintiff in error, but it is an accepted and fundamental rule in the construction of statutes, that the several clauses thereof are not to be viewed as separate enunciations of the legislative will, to be literally construed without reference to other parts of the act, but on the contrary, each part must be construed with reference to the language and purpose of the entire act, so as to make all parts harmonize and conduce to the carrying out the general purpose of the statute and a literal construction of particular clauses will not be adopted, if the effect thereof would be to operate unjustly or to cause an absurd result.

Thus in U. S. *v.* Kirby, 7 Wall., 482, it is said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed
24 that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

In Heydenfeldt *v.* Daney Gold Co., 93 U. S., 634, it was ruled: "If

a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected."

In Kohlsaat *v.* Murphy, 90 U. S., 153, it is declared that "In the exposition of statutes, the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every material part of the same."

In Holy Trinity Church *v.* United States, 143 U. S., 457, it is said: "It is a familiar rule that a thing may be within the letter of a statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted and the reports are full of cases illustrating its meaning."

Under the doctrine of these cases, it is clear that in construing the particular clause of section 5142 which declares that no increase of the capital stock shall be valid until the whole amount of the increase shall have been paid in, we must regard not only the words of the special clause, but also the other provisions of the entire act, and the effect which a given construction will have upon the admitted or undoubted purposes of the statute as a whole. Turning to section 5140 we find it therein declared that in the original organization of national banks at least fifty per cent. of the capital stock must be paid in before the bank is authorized to commence business, the remaining fifty per cent. being payable in installments of at least ten per cent. payable at the end of each month succeeding to the date when it is authorized to commence business. The provisions of this section make it imperative that within six months from the time when the bank begins business, each share must be paid in full. If after the original stock has been paid in, it is deemed advisable to increase the capital stock provision is made therefor in section 5142 as amended by section 1 of the act of May 1, 1886, 24 Statutes at Large, 18. If it were permitted, for the purpose of increasing the capital stock, to issue shares without requiring the same to be fully paid up, two evil results would follow. So far as the public are interested the bank would be doing business on an apparent capital, which in fact it did not possess, or in other words the capital stock would be watered, and so far as the holders of the original full-paid stock are concerned, the new stock, though only partly paid for, would stand on an equality with the full-paid stock, both as to voting power and right to draw dividends, which would be manifestly unjust. These are the evils intended to be prevented by enacting that when an increase of the capital should be made, the increase should not become valid unless the whole amount thereof should be paid. The statute does not require that the proposed increase shall be subscribed by one person, or at one time, but it is permissible to have as many subscribers as there are new shares. Let it be assumed that the stockholders of a national bank, by a two-thirds vote, should determine to add one hundred thousand dollars to the capital stock and should obtain in a month a subscription for twenty-five thousand dollars, that is, for two
25 hundred and fifty shares, and the full par value thereof should be paid in, and this increase should be reported to the comp-

troller and be by him approved and certificates should then be issued to the subscribers.

Would not the holders of these certificates from that time forward be stockholders even though the remaining part of the voted increase never was subscribed for? Could the bank, after receiving the money for the shares, with the approval of the comptroller, be permitted to deny to the subscribers the rights of stockholders, simply because the full amount of the proposed increase had not been obtained?

In Aspinwall *v.* Butler, 133 U. S., 595, this general question was considered, it appearing in that case that on September 13, 1881, it had been voted to increase the stock of the Pacific national bank from $500,000 to $1,000,000; that Aspinwall became a subscriber for fifty shares of this proposed increase, and on October 1st, 1881, he paid to the bank the sum of $5,000, being the face amount of the fifty shares. Subscriptions for the proposed increase of $500,000 were not procured, and on December 13, 1881, the directors adopted a resolution reciting the failure to obtain subscriptions for $38,700 of the proposed increase, that the shares subscribed for and paid up amounted to $461,300, and directing notice to be sent to the comptroller that the capital had been increased by the last-named sum. The comptroller issued a certificate under date of December 13, 1881, to the effect that the capital stock of the bank had been increased in the sum of $461,300. Shortly afterwards the bank closed its doors, an assessment of one hundred per cent. was made by the comptroller, and it was held by the supreme court that Aspinwall was liable as a stockholder for the assessment on the fifty shares subscribed and paid for by him, although the original proposed increase of $500,000 was not obtained and although it appeared that Aspinwall did not know of the action of the directors in reducing the proposed increase to $461,300.

In construing the clause of section 5142, that declares that no increase shall be valid until the whole amount of the increase is paid in, the supreme court held that "the clause in question was intended to secure the actual payment of the stock subscribed, and so to prevent what is called watering of stock. The argument of the defendant asks too much. It would apply to the original capital of a company as well as to an increase of capital. And will it do to say, after a company has been organized and gone into business, and dealt with the public, that its stockholders may withdraw their capital and be exempt from statutory liability to creditors, if they can show that the capital stock of the company was not all subscribed?"

The contention of counsel for plaintiff in error upon this point is, that the clause found in section 5142 requiring the whole increase to be paid in full, is a condition affecting the subscription of each subscriber to the proposed increase, so as to make it conditional and not effective unless the entire amount of the proposed increase is subscribed and paid for, yet in Aspinwall *v.* Butler, page 607, in considering this exact question, the supreme court said: "There was no express condition that the individual subscription should be void

if the whole $500,000 was not subscribed; and in our judgment there was no implied condition in law to that effect."

26 In Thayer *v.* Butler, 141 U. S., 234, a subscriber to forty shares of the increased capital of the Pacific national bank, when sued for the assessment thereon, asked the trial court "to rule and hold the law to be as stated in the opinion of the supreme court of Massachusetts in Eaton *v.* Pacific National Bank, reported in 144 Mass. Supreme Court Reports, page 260, and to rule and hold that the vote of the directors of September 13, 1881, was in the nature of a proposition to stockholders to subscribe for 5,000 shares of new stock and to pay in for it $500,000; that it was necessary that the stock should all be taken and the money paid in before the new stock could be created; and that it was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the comptroller should certify that they had been done and approve the increase; and that the defendant paid the money to the bank on September 28, 1881, upon the implied condition that he should not be required to take new stock unless the proposed amount of 5,000 shares were created, and as this was not done the defendant did not become a shareholder in respect of the forty shares for which he paid September 28, 1881, and for the assessment upon which the plaintiff seeks to recover."

The trial court refused to so hold and rule and the supreme court declared that, "We are of opinion that the decision of the circuit court was correct, and that there is no error in the record."

The conclusion deducible from these decisions of the supreme court is that in cases wherein the stockholders of a national bank decide, with the approval of the comptroller, to increase the capital stock therein by the addition of a named amount, the clause found in section 5142 of the Revised Statutes to the effect that no increase shall be valid until the whole amount thereof is paid in, does not create a condition, express or implied, that shares subscribed and paid for in full are not to be held valid, unless the entire amount of the proposed increase is subscribed and paid for in full. In Delano *v.* Butler, 118 U. S., 634, and in McFarlin *v.* First National Bank, 68 Fed. Rep., 868, it is said: "Three things must occur to constitute a valid increase of the capital stock of a national banking association: First, that the association, in the mode pointed out in its articles, and not in excess of the maximum prescribed for by them, shall assent to an increased amount; that the whole amount of the proposed increase shall be paid in as part of the capital of such association; and third, that the Comptroller of the Currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof and certify to the fact of its payment."

In thus defining the essentials to a valid increase of the capital stock of a national bank the supreme court in Delano *v.* Butler, and this court in McFarlin *v.* First National Bank, make use of the words found in section 5142, to the effect that to be valid the whole amount of the proposed increase must be paid, but in construing the meaning of the clause in question, thus quoted, we must follow the construc-

tion placed thereon by the supreme court in the subsequent cases of Aspinwall *v.* Butler, 133 U. S., 595; Pacific National Bank *v.* Eaton, 141 U. S., 227, and Thayer *v.* Butler, 141 U. S., 234, in all of which cases it was held, as already stated, that the clause
27 in question did not import into the stock subscriptions a condition, either express or implied, to the effect that the validity of the shares that were in fact subscribed and paid for in full was dependent on the question whether the whole of the proposed increase was subscribed and paid for. In the answer filed in this case it is averred that on September 6, 1890, the First National Bank of Sedalia, Mo., by a vote of the owners of two-thirds of the capital stock, voted to increase the capital of the bank by the addition thereto of the sum of one hundred and fifty thousand dollars; that subsequently the bank notified the comptroller that the whole amount of this increase had been paid in; that thereupon the comptroller, on the 17th of January, 1891, issued his certificate stating therein that the capital of the bank was increased in the sum of one hundred and fifty thousand dollars, the whole of the increase being paid in and that the increase of the capital stock was approved. It is also averred that the plaintiff in error in October, 1890, subscribed for fifty shares of the proposed increase and paid to the bank the sum of $5,400, and received, on or about October 25th, from the bank a certificate showing him to be the owner of the fifty shares. It is also averred that in fact only about two-thirds of the proposed increase was ever paid in, and relying on this averment that about one-third of the proposed increase had not been paid for, the claim is made that the shares which were subscribed and paid for in full, and for which certificates were duly issued, cannot now be held to be valid.

If this contention is well founded, then, as already said, it follows that if all the shares but one had been subscribed and paid for, nevertheless the holders of the certificates for the full-paid shares could not be heard to assert that they were the owners of valid shares, which would be a most unjust result. If this is the true meaning of the statute, it is made possible for parties in control of a national bank with the approval of the comptroller to authorize the increase of the capital stock, to obtain subscription and payment in full for all the shares but one or two, and then, if that be desirable, to deny to the holders of these full-paid certificates, any participation in the control of the bank, or in case the bank becomes insolvent, to shield these holders of certificates from liability to creditors. Certainly a construction of the statute having such results should not be adopted unless the statute as a whole imperatively demands it. According to the provisions of section 5142 as originally adopted, the articles of association of each bank might provide for an increase of the capital stock, the maximum of such increase in each case to be determined by the comptroller and named in the articles. By section 1 of the amendatory act of May 1, 1886, 24 Statutes at Large, 18, it is declared: "That any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase

its capital stock in accordance with existing laws, to any sum approved by the said comptroller, notwithstanding the limit fixed in its original articles of association and determined by said comptroller."

Under this amendatory statute, the maximum of increase is not the sum named in the articles of association, but repeated increases may be made from time to time by affirmative vote of the holders
28 of two-thirds of the capital stock, approved by the comptroller.

Thus in a given instance the vote of the requisite number of shareholders, approved by the comptroller, to increase the capital stock by the addition of $100,000 makes that amount for the time being, the maximum of the increase that can be lawfully made, and of necessity it authorizes the addition of sums less than the maximum. Such action, taken under the provisions of the amendatory act of 1886, means that the shareholders, by a proper vote, have authorized the increase of the capital stock by amounts not exceeding in the aggregate the maximum sum of $100,000 and that the comptroller has approved such action.

Each subscription for portions of such increase when paid up in full becomes valid and binding until the maximum is reached, and the statute does not incorporate into such subscriptions a condition that the subscriber, paying his subscription in full, cannot become a holder of valid stock unless the maximum amount of the proposed increase is subscribed and paid for.

The action of the stockholders in voting to increase the capital stock by a given sum, though approved by the comptroller does not in any sense increase the capital stock. It authorizes an increase, but does not make it. The increase is created by the procurement of subscriptions to the capital stock, the payment of each subscription in full and the issuance of the comptroller's certificate under the provisions of section 5142.

The clause providing that no increase shall be valid until the whole amount of such increase is paid in does not refer to the maximum amount of the authorized increase, but to the actual increase created by a subscription for a given number of shares. To make the subscription valid, this clause requires that it shall be paid in full, the object being to prevent the issuance of shares which are only partly paid up, but it does not require in order that validity may exist with respect to shares subscribed for and paid up in full, that the whole amount of the authorized increase should be subscribed and paid for. To so hold would be to rule directly contrary to the supreme court in Aspinwall *v.* Butler and Thayer *v.* Butler, *supra*, wherein it was held that the statute did not create a condition in each subscription to the stock, that the same should not become effectual unless the entire proposed increase was subscribed and paid in, and it therefore follows that if it be true that only two-thirds of the proposed increase of the capital stock was subscribed and paid for, as is claimed in the answer, that fact would not invalidate the shares subscribed and paid for in full and for which certificates were issued to and received by the subscribers and under

which they exercised the privileges and received the benefits of shareholders for a period of over three years.

The remaining grounds of defense relied on by plaintiff in error are based upon the assumed right to rescind the contract of subscription to the capital stock of the bank, on the ground that such subscription was procured through false representations made to plaintiff in error touching the actual pecuniary condition of the bank and to avoid the effect of the acceptance by the plaintiff in error of the shares of stock issued to him on the ground that it was falsely represented to him that the whole amount of the proposed increase of $150,000 had been paid in.

29 It will be borne in mind that this is not an action on behalf of the bank based upon the original contract of subscription, but it is a suit wherein the creditors of the bank, represented by the receiver, are seeking to enforce the liability which the statute imposes upon those who occupy the position of stockholders in a national bank, and the question is whether it is open to the plaintiff in error after the bank has become insolvent and has been put into liquidation to disclaim liability as a stockholder after having occupied that position for nearly four years. This general question was considered by this court in the case of Newton National Bank *v.* Newbegin, 74 Fed. Rep., 135; 20 C. C. A., 339, and after a consideration of the leading cases dealing with the subject, the conclusion reached was stated as follows:

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs unless the case is one in which the stockholder has exercised due diligence and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, upon one pretense or another, and to assume the role of creditor is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription, as well after as before the company ceases to be a going concern."

As already stated, the answer herein filed admits that the plaintiff in error in fact became a subscriber for fifty shares of the stock in September, 1890; that he paid into the bank the full value thereof and received the certificate issued therefor; that he received

all the dividends declared thereon and that when the bank closed its doors and was put in liquidation in May, 1894, he had not taken any action indicating a purpose to disclaim being a stockholder in the association.

Even if the situation is such that there exists a right of rescission as against the bank, such right cannot be asserted as against the creditors. If it be true that the subscription to the stock was obtained by false representations touching the pecuniary condition of the bank, that did not make the contract absolutely void, but only voidable at the option of the subscriber, and therefore when the bank was put in liquidation, the corporate creditors had the right to enforce the statutory liability against all persons who were then stockholders.

30 It is settled that if one knowingly permits his name to appear on the books of a national bank as a shareholder, and accepts the benefits of the position, he will be held liable to the responsibilities thereof in favor of creditors whose rights have intervened during the time his name thus appears as a stockholder. Chubb *v.* Upton, 95 U. S., 165; Keyser *v.* Hitz, 133 U. S., 138; Veeder *v.* Mudgett, 95 N. Y., 295; Stutz *v.* Handley, 41 Fed. Rep., 531; Pauly *v.* State Loan and Trust Co., 165 U. S., 606.

Suits of this character, strictly speaking, are not actions based upon the contract of subscription existing between the corporation and the stockholder.

The right of the creditors to enforce the statutory liability against shareholders in a national bank is not dependent upon the terms of the stock subscription contract. Thus in Scovill *v.* Thayer, 105 U. S., 143, it is said: "The stock held by the defendant was evidenced by certificates of full-paid shares; it is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders, was just as binding as if it had been expressly authorized by the charter. * * * But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full. Sawyer *v.* Hoag, 17 Wall., 610; New Albany *v.* Burke, 11 Wall., 96; Burke *v.* Smith, 16 Wall., 390.

"The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. Wood *v.* Dummer, 3 Mass., 308; Mumma *v.* Potomac Co., 8 Pet., 281; Ogilvie *v.* Knox Insurance Co., 22 How., 387; Sawyer *v.* Hoag, *supra*. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders."

The liability sought to be enforced in this case is not one created by a contract existing between the corporation and the stockholders,

but is one created by statute in favor of creditors and not in favor of the corporation. It is a liability which cannot be affected, discharged or released by any action taken by the corporation or by the combined action or agreement of the corporation and its stockholders. Thus in Delano *v.* Butler, 118 U. S., 634, it appeared that the stockholders, in order to meet the liabilities of the bank, had made an assessment of one hundred per cent. upon the capital stock which was paid in, but the bank was ultimately compelled to go into liquidation and the comptroller made an assessment upon the stockholders under the provisions of sec. 5151 of the Revised Statutes. The supreme court held that the payment of the assessment made by the stockholders did not relieve them from liability for the assessment made by the comptroller, it being said that, "under sec. 5151 the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the
31 bank. The assessment under that section is made by the authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably."

It is thus made clear that the liability sought to be enforced in this case is not dependent upon the terms, or in fact upon the existence, of a contract of subscription to the capital stock of the bank, but it is a liability imposed by statute in favor of creditors, and it is a liability, as already said, which cannot be modified or released by any action on part of the corporation or of the corporation and its stockholders.

It is created for the benefit of the creditors and no action on part of the bank can estop the creditors from enforcing their rights in this particular. Upon whom does the statute impose the liability? In National Bank *v.* Case, 99 U. S., 628, and Bowden *v.* Johnson, 107 U. S., 251, it was ruled that the actual or beneficial owner of the stock would be liable, and that this liability could not be evaded by the device of transferring the title to a third person, who might be financially irresponsible. In Pauly *v.* State Loan and Trust Company, 165 U. S., 606, it is said: "It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a receiver. But this is on the ground that by allowing his name to appear upon the stock list as owner, he represents that he is such owner; and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If as between creditors and the person assessed, the latter is not bound by that representation the list of shareholders required to be kept for the inspection of creditors and others, would lose most of its value. * * *

"As already indicated, those may be treated as shareholders within the meaning of sec. 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as own-

ers,' in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors from claiming that they were not in fact owners."

In the answer filed in this case it is admitted that the plaintiff in error subscribed for fifty shares of stock, accepted the certificates issued therefor, received the dividends paid thereon, and thus for nearly four years appeared as a stockholder on the books of the bank, and certainly these facts entitle the creditors to enforce, as against the plaintiff in error, the liability which the statute imposes upon those persons who allow themselves to be held out as owners of the capital stock of a banking association. To escape this liability the plaintiff in error pleads that he was induced to become a stockholder in the bank by reason of certain false representations made to him by the officers of the bank, with respect to the financial condition of the association, which were of such a character that he is now entitled to rescind the contract of subscription. Granting it to be true that if a suit were now brought by the bank, or on its behalf, to enforce the contract of subscription against the plaintiff in error, he might successfully defend the action on the ground that he had been induced to enter into the contract by false rep-
32 resentations on part of the bank, does it follow that this defense is available against the present action? This suit is not in favor of the bank, but is on behalf of the creditors, and is not to enforce any provision of the contract of subscription existing between the bank and the plaintiff in error, but is based upon the liability imposed by the statute, in favor of creditors against those who knowingly assume the position of stockholders, and which may exist, although no contract of subscription was ever entered into between the bank and the holder of the capital shares.

Even as between the bank and the plaintiff in error the contract of subscription was not void. It may have been voidable at the option of the plaintiff in error, but until so avoided, it remained in force. When the bank closed its doors and was put in liquidation, the plaintiff in error was in fact a shareholder and so appeared upon the books of the association. While it may be true that his subscription to the capital stock had been obtained under such circumstances that he might, at his option, rescind the same, yet he had not done so when the bank failed, and although he may not be chargeable with negligence in not earlier discovering the falsity of the representations made to him by the officers of the bank, yet the fact remains, that when the association was put in liquidation, and when the rights of the creditors became fixed, he not only appeared upon the books of the bank as the owner of fifty shares of the capital stock, but in truth he had for nearly four years held the certificate issued therefor, had received the dividends declared and had exercised all the rights of a shareholder.

These facts clearly bring the plaintiff in error within the liability imposed by the statute upon those who assume the appearance of stockholders in a national bank, and the liability thus created cannot be defeated by showing that the plaintiff in error was induced

to accept the position of stockholder by false representations made by the officers of the bank.

These officers do not represent the creditors nor can the latter be made responsible for their acts. If A., being the owner of fifty shares of the capital stock in a bank, should induce B. to purchase the same through false representations with respect to the financial condition of the bank, the stock being transferred to B. on the books of the association, could B., if the bank subsequently failed, escape liability to the creditors on the ground that he had been induced to purchase the stock through the false representations made by A.? If, under these circumstances, A. should sue B. to enforce payment for the stock, it would be open to B. to defeat the action by proof of the fraud, and it would be open to B. to sue A. for the damages caused him by the deceit practiced on him, but it certainly would not be open to B. to defeat the liability created by the statute, in favor of creditors, as against the shareholders by showing that he had been induced to purchase the stock by the false representations made by A. Does it make any difference in the result to show that A. was an officer in the bank for whose acts or representations the association might be made responsible? If it be the law, as it is declared to be by the supreme court in Scovill *v.* Thayer, *supra*, that the bank cannot, by any contract it may make with the subscribers to its capital stock, relieve the latter from the statutory liability
33 created in favor of creditors, how can it be held that this liability can be defeated by representations made by the bank or its officers?

Admitting to the fullest extent that the representations made to the plaintiff in error, by the officials of the bank, were such, that upon the discovery thereof, he would have the right to rescind the contract of subscription, yet it must be true that until he exercised the right of rescission, he would, as to creditors, be in fact a stockholder.

The answer admits that when the bank was put in liquidation, the plaintiff in error had not rescinded the contract of subscription and nothing he could thereafter do would defeat the rights of the creditors, which must be measured by the condition of affairs existing when liquidation was entered upon. It is admitted in the answer that from October, 1890, until in May, 1894, the plaintiff in error held the certificate of stock issued to him for fifty shares, claiming the same as owner, and that he received the dividends paid in the years 1891 and 1892. These acts of the plaintiff in error the creditors had an absolute right to rely upon, as evidencing the fact that during that period of time he was a shareholder in the bank, and it is not now open to the plaintiff in error, by asserting or exercising the right of rescission, which may exist between himself and the bank, to defeat the right of the creditors, which is based upon the liability which the statute imposes upon all persons who allow themselves to be held out as shareholders in a national bank. As already said, this suit is not based upon the contract of subscription between the bank and the plaintiff in error and is not, therefore,

an action wherein the issue can be made as to the voidability of that contract as between the bank and the shareholders.

The suit is on behalf of the creditors, to enforce a statutory liability in which the bank has no interest, a liability which was not created by any contract to which the bank was a party; a liability which it is beyond the power of the bank to modify, release or discharge and a liability which, if once called into existence by the act of one assuming the position of a stockholder, cannot be defeated save by the creditors or by some one acting in their behalf. Potts *v.* Wallace, 146 U. S. 689–703.

The law presumes that the creditors of a corporation become, and continue to remain such, in reliance upon the liability imposed upon the stockholders by statute, and it would be a fraud upon the creditors to permit one who has for years occupied the position of a stockholder and has received the benefits thereof, to repudiate liability to the creditors on the ground, that as between himself and the corporation, his contract of subscription to the capital stock was one voidable at his option.

In cases like the present wherein it appears that for years a person has actually sustained the relation of a stockholder in a banking association, although under circumstances which may justify a rescission of the contract of stock subscription, as between the subscriber and the corporation, the just protection of creditors whose rights have intervened during this period, requires it to be held that, as against creditors, the one who held the position of stockholder cannot escape the statutory liability by rescinding the subscription contract, after the bank has been put into liquidation.

The judgment of the circuit court is therefore affirmed.

34 SANBORN, circuit judge, dissenting:

There are two reasons why I am unable to assent to the views expressed and the conclusion reached by the majority of the court in this case. They are that, in my opinion, the fraudulent misrepresentations which induced the plaintiff in error to contract for the purchase of his stock entitle him to repudiate that purchase and to rescind his contract, and that the pretended increase of the capital of the bank was invalid and he never became liable as a stockholder because only two-thirds of the whole amount of the increase was ever paid in. Rev. Stat., sec. 5142.

The case made by the pleadings is this: In 1890 the plaintiff in error was a stranger to the bank, free from all connection with or relation to it, and ignorant of its financial standing and character. The bank was insolvent, was earning no dividends and had no surplus. To induce the plaintiff in error to purchase some shares of a proposed increase of its worthless stock, the bank falsely represented to him that it was solvent and in a flourishing condition, that it was earning dividends on its stock, that it had a surplus of $50,000 above its capital stock and liabilities, and that its stock was worth a premium of $8.00 per share. By these misrepresentations it induced him to subscribe for 50 of the 1,500 shares it proposed to issue and to deposit with it $5,400 under an understanding that this

money should be applied to the payment for this stock when the whole amount of the increase of stock was subscribed for and paid in. The entire amount was subscribed for, but only two-thirds of this increase was ever paid in. The bank then appropriated the plaintiff's $5,400 in payment for the 50 shares of stock, sent him a certificate of it, and induced him to play the role of a stockholder by the false representation that the entire increase had been paid in, and by the same false representation induced the Comptroller of the Currency to issue his certificate and approve the increase. At the same time it so falsified its books that the plaintiff in error could not by the utmost diligence learn the true condition of the bank. All this was done in October, 1890. But the bank continued to falsify its books, and to conceal the truth so that the plaintiff in error had no suspicion of the fraud and could not discover it by any reasonable diligence until after he had received two dividends on his supposed stock and the bank had closed its doors in 1894. Here is a case where a bank by the grossest false misrepresentations has induced a stranger to pay $5,400 and to incur a liability for $5,400 more, for a certificate of worthless stock that furnished no consideration for the contract. It is difficult to conceive of a grosser fraud. Upon every principle of equity and justice this subscriber was entitled to repudiate this purchase, to rescind his contract, and to recover back his money as soon as be discovered the facts. Contracts for stock in a corporation which are induced by fraud create no obligation, and the victim of the fraud has the right to their abrogation. Vreeland *v.* N. J. Stone Co., 29 N. J. Eq., 190; Thompson's Liability of Stockholders, sec. 142.

It is true that this contract was voidable and not void and that the duty to rescind it as soon as the facts were discovered, or as soon as they could be discovered with reasonable diligence, was imposed upon this subscriber. But he avers in his answer, and this
35 allegation stands admitted in this record, that the bank, systematically, skillfully, and cunningly falsified its books, concealed the facts, and continued its false representations until it closed in May, 1894, so that he could not, with the utmost diligence discover the fraud, and so that he had no suspicion of it. How can he be said to be guilty of such negligence or laches as will deprive him of relief in the face of these facts? The statutes of the State of Missouri, where this fraud was perpetrated, provide that an action for relief on the ground of fraud may be brought at any time within five years after the discovery by the aggrieved party, within ten years, of the facts constituting the fraud (Rev. Stat. Mo., 1889, sec. 6775), and it is a familiar maxim that no time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals it. Scheftel *v.* Hays, 58 Fed. Rep., 457, 460; 7 C. C. A., 308, 312; 19 U. S. App., 220, 226; Kelley *v.* Boettcher, 85 Fed. Rep., 53, 63. I am unable to escape the conviction that under this state of facts this subscriber was entitled to rescind the purchase of, and to repudiate the liability upon this stock.

It is conceded in the opinion of the majority that as against the bank the plaintiff in error would be entitled to this relief, but it is

insisted that by his delay in seeking it, and by his receipt of two dividends he is estopped from obtaining it as against the receiver, because the latter represents the creditors of the bank as well as the bank itself. In support of this view the cases of Chubb *v.* Upton, 95 U. S., 665; Veeder *v.* Mudgett, 95 N. Y., 295; Stutz *v.* Handley, 41 Fed. Rep., 531; Pauly *v.* State Loan & Trust Co., 165 U. S., 606, and Keyser *v.* Hitz, 133 U. S., 138, are cited. But there seems to me to be a radical difference between the standing of the subscriber in this case and that of the subscriber in Chubb *v.* Upton, Keyser *v.* Hitz, Upton *v.* Tribilcock, 91 U. S., 45; Sanger *v.* Upton, 91 U. S., 56, 63, and other cases of that class. In this case the plaintiff in error was induced to purchase by a gross and continuing fraud which kept him in ignorance of the facts, and rendered it impossible for him to discover them by the use of reasonable diligence. In those cases the subscriptions were not induced by fraudulent, continued and successful misrepresentations and concealments of material facts which lulled suspicion and hid the truth, but the defences were the defective exercise of the power to issue stock as in Chubb *v.* Upton, the defective transfer of stock as in Keyser *v.* Hitz and Sanger *v.* Upton, 91 U. S., 63, a misrepresentation as to the legal effect of the stock certificate which purported to be non-assessable, which was held to be a misrepresentation of a matter of law and unavailable, as in Upton *v.* Tribilcock, 91 U. S., 45, 50, the fact that an increase of stock was irregularly, but not fraudulently issued and knowingly retained as in Veeder *v.* Mudgett, 95 N. Y., 295, 310, and Stutz *v.* Handley, 41 Fed. Rep., 531, that subscribers or pledgees knowingly held themselves out as owners of stock "in such way and under such circumstances as upon principles of fair dealing will estop them as against creditors from claiming that they were not in fact owners" as was said in speaking of supposed cases in Pauly *v.* State Loan & Trust Co., 165 U. S., 606, 623, and that subscriptions were knowingly ratified and adopted after full knowledge of the falsity of the statements which induced them, as in Ogilvie *et al. v.* Knox Ins. Co. *et al.*, 22 How., 380, 390. In these cases the subscribers or holders were held to be estopped as against
36 the creditors because they continued to act as stockholders after they knew, or by the exercise of reasonable diligence might have known the facts. None of them were tricked into the place of stockholders and retained there by a continued fraud which kept them in ignorance of, and rendered it impossible for them to learn the truth by the exercise of reasonable diligence, as the plaintiff in error was in the case at bar. This is the radical distinction between the cases referred to and that in hand. It separates by as wide a difference the cases of Scovill *v.* Thayer, 105 U. S., 193; Sawyer *v.* Hoag, 17 Wall., 610; Albany *v.* Burke, 11 Wall., 96; Burke *v.* Smith, 16 Wall., 390; Mumma *v.* Potomac Co., 8 Pet., 281; Delano *v.* Butler, 118 U. S., 634; National Bank *v.* Case, 99 U. S., 628; Bowden *v.* Johnson, 107 U. S., 251, and Potts *v.* Wallace, 146 U. S., 689, 703, cited in the opinion of the majority. It is held in those cases that those who knowingly permit themselves in various ways to appear to be stockholders, those who were stockholders

but presented the false appearance that they were not, and those who fraudulently transferred their stock to irresponsible parties to escape liability were estopped from defeating creditors of the corporation in their attempts to hold them as such. It is indeed repeatedly said in those cases that the property of an insolvent corporation and the liability of the stockholders is a trust fund pledged for the benefit of the creditors, and that is equally true of every insolvent person. But in none of these cases, in no case cited by the court or the counsel, was the holder of the stock duped into his place and liability by undiscoverable fraud. In none of them did any court hold that money obtained from, or liability imposed upon a stockholder by fraud which he could not discover, was a trust fund held for the benefit of the creditors of the corporation which perpetrated the fraud. Can a debtor by fraud confer upon his creditors any greater right to the property or liability of his victim than he gets himself? In the opinion of the majority this question is propounded: "If A., being the owner of fifty shares of the capital stock in a bank, should induce B. to purchase the same through false representations with respect to the financial condition of the bank, the stock being transferred to B. on the books of the association, could B., if the bank subsequently failed, escape liability to the creditors on the ground that he had been induced to purchase the stock through the false representations made by A.?" In my opinion, in the absence of other proof of an estoppel *in pais*, the question should be answered in the affirmative, because fraud avoids every purchase, every sale, every contract, as against every one but an innocent purchaser or creditor who has taken his place in reliance upon it. That, however, is not the question in this case. The question here is: Could the assignee or receiver of B.'s property, in the case of the sale supposed, enforce a non-negotiable obligation of A., which B. had induced him to make by the fraudulent misrepresentations? Regarding the answer to this question it seems to me there ought not to be two opinions. If a debtor procures goods by false representations, the rights of the defrauded vendor to recover them are always superior to those of the creditors of the vendee or the receiver who represents them. *A fortiori* if, by the fraudulent representations by which he sells his goods, he procures an assumption of liability by the vendee, the right of the latter to a rescission of the sale and a cancellation of the obligation is superior to
37 the rights of either his creditors or his receiver to enforce it. Beach on Receivers, § 704; Litchfield Bank *v.* Peck, 29 Conn., 384, 386; Bussing *et al. v.* Rice, 2 Cush., 48; Rohrbough *v.* Leopold, 68 Tex., 254, 258; Root *v.* French, 13 Wend., 570, 573; Barnard *v.* Campbell, 58 N. Y., 73; Slagle *v.* Goodnow, 45 Minn., 531; Oswego Starch Factory *v.* Lendrum, 57 Ia., 573, and cases there cited; Atwood *v.* Dearborn, 1 Allen, 483; Devoe *v.* Brandt, 53 N. Y., 462, 465; Benjamin on Sales, § 433, note I. Why is not the right of one who is induced by the fraudulent misrepresentations of a bank to buy its stock, to a rescission of that sale and a release of the liability it imposes, superior to the claims of its creditors or its receiver to enforce them? Fraud vitiates every contract based upon it. A contract of

subscription for, or purchase of, stock, is no exception to the rule, and the relation and liability of a stockholder cannot exist without the existence, or an estoppel from denying the existence, of the contract of subscription or purchase. It is true, as is shown in Scovill *v.* Thayer, and other cases cited, that the stockholders' liability and the maintenance of the action upon it is not dependent upon the terms of the contract of subscription where those terms are in conflict with the law or the statute, as was the contract that the stock was non-assessable, but the existence of a valid contract of subscription or an estoppel from denying its existence is a *sine qua non* to the existence of the liability and the maintenance of the action. Without it there can be no stockholder, and hence, no liability of a stockholder. And, where the contract is induced by fraud, and is rescinded without negligence or delay as soon as the facts constituting it are discovered, it is as though it had not been, and there remains neither contract nor stockholder, nor liability of a stockholder. In all the cases that have been cited in which the liability was enforced a contract of subscription or purchase which had not been induced by fraud, or which had been ratified after its discovery, existed, and the stockholders in those cases were held because, as was well said in Pauly *v.* State Loan & Trust Co., 165 U. S., 606, 623, they were the real owners of the stock or held themselves out or "allowed themselves to be held out as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not in fact, owners." But one who is induced by a continuing fraud to subscribe for, or to purchase and to retain stock is not estopped as against creditors on principles of fair dealing from repudiating the contract and liability when he discovers the facts, because he has never knowingly or negligently deceived them to their injury. So are the American authorities that have treated of such fraudulent contract, (Newton National Bank *v.* Newbegin, 40 U. S. App., 1; 20 C. C. A., 339; 74 Fed. Rep., 135; Florida Land & Improvement Company *v.* Merrill, 52 Fed. Rep., 77, 80; Upton *v.* Tribilcock, 91 U. S., 54; Winters *v.* Armstrong, 37 Fed. Rep., 516, 517; Duffield *v.* Barnum, 31 N. W. Rep. (Mich.), 310, 316), and they clearly mark and strongly emphasize the distinction between the cases relied upon in the opinion of the majority and that now before us. In all the cases cited by the majority either a valid contract of subscription or purchase existed, or the stockholders were estopped from rescinding a voidable contract because they had acted as such after they knew or might have known the facts upon which they relied to avoid it. In the case at bar the contract was
38 induced by fraud and it was concealed by fraud. In this case no estoppel against the plaintiff in error can be sustained because he did not know, and could not learn the facts, and no duty to speak or act rested upon him until he acquired that knowledge or means of knowledge. It may be that upon a trial of this case evidence could be adduced which would estop him from repudiating the purchase of this stock, but upon the admitted allegations of his answer here, there are several reasons why I

think he is not barred as against this receiver and the creditors he represents from obtaining the relief he seeks.

An estoppel arises only when one knowingly or negligently represents to another who is ignorant and relies and acts upon the representation to his injury that a fact or condition exists, which has no existence. An essential element of such an estoppel is a wilful intent to deceive, or such gross negligence of the rights of others as is tantamount thereto. There must be some moral turpitude or some breach of duty. Henshaw *v.* Bissell, 18 Wall., 255, 271; Bank *v.* Farwell, 58 Fed. Rep., 633, 636, 639; 7 C. C. A., 391, 394, 396; 19 U. S. App., 256, 262, 265; N. Y. Life Ins. Co. *v.* McMaster, 87 Fed. Rep., 63, 66. Mr. Justice Field, speaking of this estoppel in Henshaw *v.* Bissell, says: "For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud. An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result." As long as the plaintiff in error did not know and could not learn by the use of reasonable diligence the facts constituting the fraud upon him until after the bank had incurred its debts to all its creditors, he was not guilty of any breach of duty to them or of any negligence to their rights, or of any intent to deceive them and they cannot sustain the plea of an estoppel against him.

Another requisite ingredient of an estoppel by conduct or declarations is, that the party claiming its benefit has acted upon it in such a way, that he will be injured if the natural inference from it is denied. The deceit of the victim of the representations and consequent damage from their denial are indispensable to the existence of the estoppel. N. Y. Life Ins. Co. *v.* McMaster, 87 Fed. Rep., 63, 66; Bonsack Machine Co. *v.* S. F. Hess & Co., 68 Fed. Rep., 119, 135; 15 C. C. A., 303, 318; 25 U. S. App., 315, 341. There is nothing in this record to show that any creditor of this bank loaned his money to it or deposited his funds with it in reliance upon the fact that the plaintiff in error appeared to own fifty shares of stock in it, and I am aware of no presumption of law or of fact which makes it our duty to reach this conclusion in the absence of pleading and proof.

Moreover an estoppel does not operate in favor of everybody. No one can set it up or derive any benefit from it, who has not been misled by the misrepresentation or conduct to his injury. Ketchum *v.* Duncan, 96 U. S., 659, 666; The Howard Carroll, 14 U. S.
39 App., 506; Harris *in re*, 57 Fed. Rep., 243, 246; 6 C. C. A., 320. If it were conceded that a creditor of the bank who was induced to become such by his reliance upon the fact that the plaintiff in error appeared to have fifty shares of stock could estop him from escaping from a liability thereon, that estoppel could not

inure to the benefit of any creditor who was not induced to become such, in reliance upon that fact. If there were some creditors who were, and some who were not induced to become such in reliance upon this fact the receiver could not derive any benefit from it in this suit because he can enforce only the common rights and claims of all the creditors, and he cannot plead or urge the personal claims of individual creditors which are not common to all. He cannot enforce an estoppel which may belong to one-third or one-tenth of the creditors and distribute the proceeds he derives from it among them all. The right of a creditor to enforce such an estoppel is a personal right which no one but the creditor misled by the representation can urge and the receiver cannot avail himself of it, unless all the creditors have been induced to loan their money to this bank by the apparent ownership of its stock by the plaintiff in error. There is neither plea nor evidence of such a state of facts in this case. Indeed the pleadings show that when this stock was subscribed, the bank owed more than the value of all its assets. A state of things once shown to exist is presumed to continue, and where, as in this case, it appears that a bank owed more than the value of all its property in 1890 and again in 1894, the presumption that it had paid all of its old creditors and become indebted to new ones during this four years would be contrary to the common experience and observation of business men, violent and unreasonable. The strong probability is, that most of the creditors of this bank loaned their money to it prior to 1890, and they surely cannot plead an estoppel. Whether they did or not, I am strongly of the opinion that the plaintiff in error is entitled to pleading and proof that some or all of these creditors loaned their money in reliance upon his ownership of the stock before an estoppel against him is found. "A creditor who has been defrauded by misrepresentation of the real capital of the company has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders, who have taken no part in it." Scovill *v.* Thayer, 105 U. S., 143, 151.

Finally, even if the fact were established that a creditor loaned his money since 1890 in reliance on the ownership of the stock of the plaintiff in error, I am unable to perceive any right or equity in his claim superior to that of the plaintiff in error. In that case they were both deceived by the same fraud. They were both kept in ignorance of the actual facts by the same falsifications and devices, and I see no reason why one of the victims of such a wrong should be allowed to prey upon the other. The bank induced the plaintiff in error to play the part of a stockholder, and thereby to lose all the money he deposited with it and to run the risk of liability to lose as much more by the same scheme of false representations of its solvency, of its flourishing condition, and of its increase of stock which doubtless induced the creditor to take the bank's promise of repayment for the money he deposited with it. In such a case why should not the right of the pur-

chaser of stock who suffers the greater wrong, be equal to that of the creditor who suffers less? Neither of them was aware of the fraud. Neither of them did or could discover it, until both were injured. Neither of them knowingly or negligently deceived the other, and in my opinion neither of them is entitled to estop the other from undoing the fraud from which they suffer. Newton Nat. Bank *v.* Newbegin, 74 Fed. Rep., 135, 140; 20 C. C. A., 339, 344; Florida Land, etc., Co. *v.* Merrill, 52 Fed. Rep., 77, 80; 2 C. C. A., 629, 632; 2 U. S. App., 434, 439, 440; Upton *v.* Tribilcock, 91 U. S., 45, 54; Winters *v.* Armstrong, 37 Fed. Rep., 512, 516, 517; Duffield *v.* E. T. Barnum Wire & Iron Works, 31 N. W. Rep. (Mich.), 310, 316.

The other question in this case is, does the subscriber for shares in the proposed increase of the capital stock of a national bank under an understanding with the bank that his money on deposit there shall be used to pay his subscription only when the entire increased capital is paid in, become a stockholder of the bank and liable as such, when all the increased capital is subscribed for, but only two-thirds of it is paid in, and the bank appropriates his money to its own use, sends him a certificate of stock and falsely represents that the entire increased capital has been paid in? I cannot persuade myself that this question should be answered in the affirmative. The answer pleads that the plaintiff in error agreed to purchase his stock on the express condition that he should not take it, and his $5,400 on deposit with the bank should not be used to pay for it until the entire $150,000 of proposed increase of capital was paid in. The condition was never fulfilled, the increased capital was never paid in, and upon familiar principles the subscriber never became a stockholder. The fact that the bank falsely represented to him that the condition had been complied with, and so falsified its books that its falsehood appeared to be the truth, and the subscriber believed it, cannot change the fact or its legal effect. It was the fact of payment and not the bank's false statement regarding it that conditioned the contract of subscription, and, as that condition was never fulfilled, and as the subscriber never learned and never could learn until after the failure of the bank that it was not complied with, so that he did not waive it, he never became a stockholder by the express terms of his contract of purchase.

Moreover, I am unable to concur in the view that the proper construction of the provision of sec. 5142 of the Revised Statutes that "no increase of capital shall be valid until the whole amount of such increase is paid in" is that every increase of capital is valid, any part of which is paid in, and I am unable to see how the judgment in this case can be sustained without adopting exactly that interpretation of this clause of the statute.

In Delano *v.* Butler, 118 U. S., 634, 649, and in McFarlin *v.* First Nat. Bank, 68 Fed. Rep., 868, 872, it was held that "three things must concur to constitute a valid increase of the capital stock of a national banking association; 1st, that the association, in the mode pointed out in its articles and not in excess of the maximum prescribed by them, shall assent to an increased amount; 2nd, that the whole amount of the proposed increase shall be paid in as part of

the capital of such association; and 3rd, that the Comptroller
41 of the Currency by his certificate, specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment." I do not understand that the Supreme Court has modified or departed from this holding in the later cases of Aspinwall *v.* Butler, 133 U. S., 595; Pacific Nat. Bank *v.* Eaton, 141 U. S., 227, and Thayer *v.* Butler, 141 U. S., 234. In each of those cases the amount of increase originally proposed was $500,000, but only $461,300 was actually subscribed and paid in. When this had been done, the bank modified its proposal, limited the amount of its increase to $461,300, notified the Comptroller that this amount had been subscribed and paid in, and he issued his certificate for, and approved the increase, not of $500,000, but of $461,300. In this state of facts, the court held the increase valid. The key to these decisions is found however in the holding of that court in Delano *v.* Butler that the three conditions of the act of Congress had been exactly fulfilled. It said: "In the present case the association did, in fact, finally assent to an increase of the capital stock, limited to $461,300; that amount was paid in as capital, and the Comptroller of the Currency by his certificate approved of the increase, and certified to its payment; so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisitions of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000 subsequently reduced to the amount actually paid in, does not seem to affect the question, for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the Comptroller of the Currency." 118 U. S., 649. I agree, that, if the Bank of Sedalia, after it had proposed the increase of $150,000, had obtained subscriptions and payment in full for $100,000 of increased stock, and had then limited its increase to that amount, reported that fact and that the $100,000 had been paid in, and had obtained from the comptroller his certificate and approval of an increase, not of $150,000, but of $100,000, the new stock would have been valid. But could that bank issue valid increased stock for $150,000 when only $100,000 was actually paid in, in the teeth of the plain declaration of the statute that no increase shall be valid until the whole amount of such increase is paid in? Could it issue valid new stock for $150,000 when only $1,000 or $100 was actually paid in? That is the real question in this case. The pleadings concede that the bank proposed an increase of $150,000 that this amount was subscribed for, that the comptroller was induced by the false representations of the bank to certify and approve an increase of that amount, and that only two-thirds of that amount was actually paid in.

The evils against which that clause of the statute was directed were, that if the new stock was issued without payment of the entire amount of the increase, the stock would be watered, the bank would be doing business on an apparent capital which it did not

in fact possess, and the stockholders who paid for their stock would be wrongfully placed on an equality with those who held stock that was only partly paid for, or was not paid for at all. In the cases arising out of the failure of the Pacific national bank these
42 evils did not result, because the $461,300 actually paid in was the limit of the increase finally fixed by the bank and certified and approved by the comptroller. But in the case at bar they have resulted. The increase proposed by the bank and the increase certified was $150,000, while only $100,000 was paid in. The stock was watered. The apparent capital was $50,000 more than the real capital. Every stockholder who paid for his stock was put on an equality with those who had not paid at all, or who had paid in part only. The pretended increase of the capital of this bank falls clearly and literally within the plain provision of the act of Congress, "No increase of capital shall be valid until the whole amount of such increase is paid in," and in Aspinwall *v.* Butler, 133 U. S., 608, the Supreme Court decided it in that case when it said, "This clause would have been violated by an issue of $500,000 of new stock when only $461,300 was paid in, but not by an issue of the exact amount that was paid in."

That is this case. New stock to the amount of $150,000 was issued while only $100,000 was paid in, and because this pretended increase of capital has produced the very evils which the statute was enacted to prevent, because it violates the plain terms of the act of Congress, and because the Supreme Court so held in Aspinwall *v.* Butler, I have been forced to the conclusion that the new stock issued by this bank was invalid, and that the plaintiff in error is not liable upon it as a stockholder. I concede, as was held in Aspinwall *v.* Butler and in Thayer *v.* Butler, 141 U. S., 234, that a subscription to a proposed increase of stock contains no implied condition that the entire increase proposed shall be subscribed and paid for, because it is discretionary with the bank and the comptroller to reduce or change that amount at any time before it is certified and approved by the latter. But in my opinion every such subscription is made upon the express condition clearly set forth in the statute that it shall not be valid if the amount of the increase of capital finally reported to the comptroller and certified and approved by him exceeds the amount actually paid in for the new stock. Compliance with this condition is not discretionary with the bank or with the comptroller, and, as in the case at bar, it was never fulfilled, and that fact was fraudulently and successfully concealed from the plaintiff in error until the bank failed so that he never waived the condition, he cannot, in my opinion, be justly held liable for any of the debts of this bank. I think the judgment below should be reversed.

Filed October 3, 1898.

43 (*Judgment.*)

And on the third day of October, A. D. 1898, in the record of the proceedings of said circuit court of appeals, is a judgment in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1898.

MONDAY, *October* 3, 1898.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error. } No. 1026.

In error to the circuit court of the United States for the western district of Missouri.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Missouri and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, have and recover against George H. Scott the sum of twenty dollars for his costs herein and have execution therefor.

October 3, 1898.

And on the eighteenth day of September, A. D. 1899, a certified copy of stipulation and order of substitution in circuit court was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

44 *Stipulation.*

It is hereby stipulated in the above-entitled action that Parry L. Deweese has been heretofore duly appointed receiver of said First National Bank of Sedalia, Missouri, in place of said W. A. Latimer, and that said court may make an order substituting said Parry L. Deweese for said W. A. Latimer as plaintiff herein and directing that the title to said action be "Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, plaintiff, *vs.* George H. Scott, defendant," instead of "W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, plaintiff, *vs.* George H. Scott, defendant."

And it is further stipulated that a copy of this stipulation and of said order may be certified by the clerk of the above-named court to the U. S. circuit court of appeals for the eighth circuit and be

made a part of the record in this case of said circuit court of appeals.

WM. S. SHIRK,
Attorney for Plaintiff, W. A. Latimer, Receiver, etc., and for Parry L. Deweese, Receiver, etc.
STEVENS, O'BRIEN, COLE & ALBRECHT,
Attorneys for Defendant.

Dated August 25, 1899.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Plaintiff,
vs.
GEORGE H. SCOTT, Defendant. } Order.

Upon reading and filing the foregoing stipulation between the parties to the above-entitled action, it is—

Ordered that Parry L. Deweese be, and he is hereby, substituted for said W. A. Latimer as plaintiff herein, and that the title to said action be "Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, plaintiff, *vs.* George H. Scott, defendant," instead of "W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, plaintiff, *vs.* George H. Scott, defendant."

45

It is ordered further that a copy of this order and said stipulation be certified by the clerk of this court to the U. S. circuit court of appeals for the eighth circuit as a part of the record in said case.

JNO. F. PHILIPS, *Judge.*

Dated September 2d, 1899.

WESTERN DISTRICT OF MISSOURI, ss:

I, Henry C. Geisberg, clerk of the circuit court of the United States for the central division of the western district of Missouri, do hereby certify that the foregoing is a true transcript of the stipulation and order in the case therein mentioned this day filed in my office.

In testimony whereof I have hereunto set my hand and affix the seal of said court, at office, in the city of Jefferson, Mo., this 5th day of September, A. D. 1899.

[SEAL.]

H. C. GEISBERG, *Clerk.*

Endorsed: No. 1026. George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver, etc. Certified copy — stipulation and order of substitution in circuit court. Filed Sep. 18, 1899. John D. Jordan, clerk.

And on the eighteenth day of September, A. D. 1899, a stipulation and order substituting Parry L. Deweese as defendant in error

was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

46 GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error.

It is hereby stipulated in the above-entitled action that Parry L. Deweese has been heretofore duly appointed receiver of said bank instead of said W. A. Latimer, and that said court may make an order substituting said Parry L. Deweese for said W. A. Latimer as defendant in error herein, so that the title of said action be "George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, defendant in error," instead of "George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, defendant in error."

WM. S. SHIRK,
Attorney for Defendant in Error and for Parry L. Deweese, Receiver, etc.
STEVENS, O'BRIEN, COLE & ALBRECHT,
Attorneys for Plaintiff in Error.

Dated August 25, 1899.

United States Circuit Court of Appeals, Eighth Circuit.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error.

Upon reading and filing the foregoing stipulation between the parties to the above-entitled action, it is—

Ordered that Parry L. Deweese be, and he is hereby, substituted for said W. A. Latimer as defendant in error herein, so that the title of said action be "George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, defendant in error," instead of "George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver of the
47 First National Bank of Sedalia, Missouri, defendant in error."

WALTER H. SANBORN,
Circuit Judge.

Dated September 18, 1899.

Endorsed: No. 1026. George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver, etc. Stipulation and order substituting Parry L. Deweese as defendant in error. Filed Sep. 18, 1899. John D. Jordan, clerk.

(*Bond.*)

And on the twenty-fifth day of September, A. D. 1899, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
PARRY L. DEWEESE (Substituted for W. A. Latimer), Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error. } Bond.

Know all men by these presents that we, George H. Scott, as principal, and National Surety Company of New York, as sureties, are held and firmly bound unto Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, in the full and just sum of two hundred and fifty ($250.00) dollars, to be paid to the said Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, or his successors or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6 day of September, in the year of our Lord one thousand eight hundred and ninety-nine (1899).

48 Whereas lately, at the May, 1898, term of the above-entitled court, in a suit pending in said court between George H. Scott, plaintiff in error, and Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, defendant in error, a judgment was rendered against the said George H. Scott, and the said George H. Scott has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, citing and admonishing him to be and appear in the United States Supreme Court, at the city of Washington, D. C., thirty (30) days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said George H. Scott shall prosecute said writ of error to effect and answer all costs if he fail to make good his plea, then the above obligation to be void; otherwise to remain in full force and virtue.

GEO. H. SCOTT. [SEAL.]
NATIONAL SURETY COMPANY, [SEAL.]
By MAURICE AUERBACH,
Resident Vice-President.

Attest: W. S. McCURDY, [SEAL.]
Resident Ass't Secretary.

Sealed and delivered in presence of—
WM. H. VORIS.
E. L. BUNKER.
C. T. GIFFORD.
L. F. HOLCOMBE.

STATE OF CALIFORNIA, } ss:
County of San Bernardino, }

Be it known that on the 6th day of September, A. D. 1899, personally appeared before me George H. Scott, to me known to be the same person described in and who executed the foregoing bond, and acknowledged the same to be his own free act and deed.

[SEAL.] C. T. GIFFORD,
Notary Public, San Bernardino County, California.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

49 On this 13th day of September, 1899, before me, personally appeared William S. McCurdy, resident assistant secretary of the National Surety Company, the above-named corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he is resident assistant secretary of said corporation, the National Surety Company; that he knows the corporate seal of said corporation; that the seal affixed to the foregoing instrument is the corporate seal; that it was affixed by order of the board of directors of said corporation; that the internal-revenue stamps affixed to said instrument, exclusive of the fifty-cent stamp affixed thereto and canceled by the principal in said instrument named, is equal in amount to one-half of one per cent. on each dollar or fractional part thereof of the amount of premium charged by said corporation as the surety on said instrument, and that he signed said instrument as resident assistant secretary of said corporation by like authority; and the said William S. McCurdy further said that he is acquainted with Maurice Auerbach and knows him to be resident vice-president of said company; that the signature of said Maurice Auerbach subscribed to the said instrument is the genuine handwriting of the said Maurice Auerbach and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said William S. McCurdy, resident assistant secretary; and the said William S. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] L. F. HOLCOMBE,
Notary Public, Ramsey County, Minnesota.

Financial Exhibit of the National Surety Company of New York as of March 31st, 1899.

Assets.

U. S. Government bonds	$66,450.00
New York city bonds	811,770.00
Brooklyn city bonds	71,075.00
A., T. & S. F. R'y Co. bonds	81,625.00
Mortgage loans (first liens)	44,775.00
Advance on contracts guaranteed; secured by mortgages and cash payments assigned to the company	97,706.24

50	Cash in banks	86,272.50
	Net premiums in course of transmission	98,522.86
	Accrued interest on investments	12,941.22
		$1,371,137.82

Liabilities.

Capital	$500,000.00
Claims in process of adjustment	27,591.04
Special reserve for contingent claims under reinsurance contract	21,000.00
Trust funds and all other liabilities	47,267.12
Reinsurance reserve as required by law	241,619.83
Net surplus	533,659.83
	$1,371,137.82

STATE OF MINNESOTA, } ss:
County of Ramsey, }

William S. McCurdy, of St. Paul, Minn., being duly sworn, deposes and says that he is resident assistant secretary of the National Surety Company of New York, and that the above and foregoing is a full, true, and correct statement of the financial condition of said company on the thirty-first day of March, A. D. 1899, as the same remains on file in the office of the Attorney General of the United States.

Subscribed in my presence and sworn to before me this 13th day of Sept., A. D. 1899.

[SEAL.]

L. F. HOLCOMBE,
Notary Public, Ramsey County, Minnesota.

Endorsed: United States circuit court of appeals. George H. Scott *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. The within bond is hereby approved. Brown, associate justice of the Supreme Court of the U. S. Filed Sep. 25, 1899. John D. Jordan, clerk. Hiram F. Stevens and Haydn S. Cole, att'ys for Geo. H. Scott.

51 (*Assignment of Errors.*)

And on the twenty-fifth day of September, A. D. 1899, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the Supreme Court of the United States.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
PARRY L. DEWEESE (Substituted for W. A. Latimer), Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error.

Assignment of errors.

In the above-entitled proceedings in error from the United States circuit court of appeals, eighth circuit, the plaintiff in error makes the following assignments of error:

First. That the court erred in holding that where the stockholders of a national bank decide, with the approval of the comptroller, to increase the capital stock therein by a named amount, the clause of Revised Statutes, chapter 5142, to the effect that no increase shall be valid until the whole amount is paid in does not create a condition, express or implied, that shares subscribed and paid for in full are not to be held valid unless the entire amount of the proposed increase is subscribed and paid for in full, but refers only to the actual increase created by a subscription for a given number of shares, which must be paid for in full to render it valid.

Second. The court erred in holding that the amount of the proposed increase decided upon and approved by the comptroller merely fixes the maximum increase authorized, and each subscription thereto when paid up in full becomes valid and binding until such maximum is reached.

Third. The court erred in holding that the liability of a stockholder in a national bank for assessments made by the comptroller on its insolvency is not dependent upon the contract of subscription between the stockholder and the corporation, but is created by statute for the benefit of the bank's creditors, and can neither be
52 modified nor released by any act of the corporation.

Fourth. The court erred in holding that one who has been induced by false representations of its officers to subscribe to the increased stock of a national bank, though without knowledge of the fraud or means of ascertaining it, cannot after the bank has been placed in liquidation exercise his option to rescind the contract of subscription as against the bank's creditors.

Fifth. The court erred in holding that the facts alleged in the answer did not constitute a defense to the cause of action stated in the complaint.

Wherefore the plaintiff in error asks and prays that your honorable court, the Supreme Court of the United States, reverse the judgment in this case.

HIRAM F. STEVENS,
HAYDN S. COLE,
Attorneys for Plaintiff in Error.

Endorsed: United States Supreme Court. George H. Scott *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. Assignment of errors.

Filed Sep. 25, 1899. John D. Jordan, clerk. Hiram F. Stevens & Haydn S. Cole, attorneys for plaintiff in error.

(*Petition for Writ of Error.*)

And on the twenty-fifth day of September, A. D. 1899, a petition for writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

Supreme Court of the United States.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
PARRY L. DEWEESE (Substituted for W. A. Latimer), Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error.

To the honorable judges of the United States Supreme Court:

53 Your petitioner, George H. Scott, would most respectfully represent as follows:

That in a certain action of law heard and determined in the United States circuit court of appeals, eighth circuit, wherein your petitioner was plaintiff in error and W. A. Latimer, as receiver of the First National Bank of Sedalia, Missouri, was defendant in error, judgment was rendered in favor of said defendant in error and against your petitioner at the May term, 1898, of said circuit court of appeals, and said judgment was rendered on the 3rd day of October, 1898.

That heretofore said Parry L. Deweese has been duly substituted for said W. A. Latimer as defendant in error herein.

That your petitioner further represents that there are manifest errors in the records and proceedings in said case in said circuit court of appeals which your petitioner desires to be by your honors examined, corrected, and adjudged what of right, according to the laws and customs of the United States, should be done therein in the premises; and accordingly your petitioner prays that your honors will grant, issue, and award a writ of error out of this honorable court, directed to the honorable judges of the United States circuit court of appeals, eighth circuit, commanding them to send to your honorable court the records and proceedings aforesaid, with all things concerning the same, together with said writ, that your honorable court may examine the same and pronounce judgment therein as in the judgment of your honorable court is right and proper in the case, and that you issue a citation to the said Parry L. Deweese (substituted for W. A. Latimer), as receiver of the First National Bank of Sedalia, Missouri.

HIRAM F. STEVENS,
HAYDN S. COLE,
Attorneys for Petitioner.

Endorsed: United States circuit court of appeals, eighth circuit. George H. Scott *vs.* Parry L. Deweese (substituted for W. A. Latimer),

receiver of the First National Bank of Sedalia, Missouri. Petition for writ of error. Filed Sep. 25, 1899. John D. Jordan, clerk. Hiram F. Stevens & Haydn S. Cole, attorneys for petitioner.

54 (*Writ of Error.*)

And on the twenty-fifth day of September, A. D. 1899, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between George H. Scott, plaintiff in error, and Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1026. George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. Writ of error. Filed Sep. 25, 1899. John D. Jordan, clerk.

Return to Writ.

United States Circuit Court of Appeals, Eighth Circuit, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this twenty-ninth day of September, A. D. 1899.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

56 (*Citation.*)

And on the twenty-ninth day of September, A. D. 1899, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the acknowledgment of service endorsed thereon, is hereto attached and herewith returned:

57 UNITED STATES OF AMERICA, *ss:*

To Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein George H. Scott is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 23d day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

STATE OF MISSOURI, *County of Pettis, City of Sedalia,* } *ss:*

I hereby acknowledge that a copy of the within citation was this day delivered to me. Witness my hand, as attorney for the defendant in error, this the 28th day of September, A. D. 1899.

WM. S. SHIRK,
Attorney for P. L. Deweese, Def't in Error.

[Endorsed:] Original, No. 1026. George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. Citation. Filed Sep. 29, 1899. John D. Jordan, clerk.

58 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing fifty-seven pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, No. 1026, as fully as the same remain on file and of record in my said office.

I do further certify that the original writ of error and the original citation, with acknowledgment of service endorsed thereon, are each hereto attached and herewith returned.

I do further certify that on the third day of December, A. D. 1898, a mandate was issued out of the clerk's office of said circuit court of appeals, in accordance with the judgment of said court, directed to the judges of the circuit court of the United States for the western district of Missouri.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at my office, this twenty-ninth day of September, A. D. 1899.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[10-cent U. S. internal-revenue stamp, canceled Sept. 29, '99. J. D. J.]

Endorsed on cover: File No., 17,546. U. S. C. C. appeals, 8th circuit. Term No., 148. George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. Filed October 23, 1899.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 148.

GEORGE H. SCOTT,
Plaintff in Error,

vs.

PARRY L. DEWEESE (substituted for W. A. LATIMER), Receiver of First National Bank of Sedalia, Mo.,
Defendant in Error.

In error to the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT OF CASE.

This action was brought in the United States Circuit Court for the Western District of Missouri by the receiver of the First National Bank of Sedalia, Mo., to recover an assessment made by the

comptroller of the currency upon 50 shares of stock claimed to be held and owned by Scott, plaintiff in error. The original capital of this bank was $100,000. On September 6, 1890, the shareholders, by a vote of the owners of two-thirds of the capital stock, resolved to increase said capital to $250,000. Sometime in said month of September the officers of said bank informed and represented to Scott as follows: "That said bank contemplated increasing its capital stock from $100,000 to $250,000; that said intended increase of capital was made desirable on account of the increasing business of said bank; that said bank was in a flourishing condition and earning large dividends upon its capital stock and then had a surplus of $50,000 over and above its capital stock and all liabilities; that from said surplus such dividends would be declared as would make each of the 2,500 shares of stock worth the sum of $108." (Transcript of Record, folios 10, 11.) Relying upon these representations Scott subscribed for 50 shares of said proposed increase of $150,000, and in October, 1890, he deposited in said bank, as by statute he was required to do, the sum of $5,400 and at the time he deposited this money it was the understanding between Scott and the bank that said $5,400 was to be held by the bank and applied in payment of defendant's subscription when all of said proposed increase of capital was subscribed for and the money therefor paid into said bank and when the issue of said shares could be legally made. The bank gave Scott a receipt for the money so deposited. On October 25,

1890, the bank delivered to Scott a certificate for 50 shares of this pretended increase of capital and then and there represented to Scott that the increase had been legally made, that the full amount of the increase had been subscribed for and paid in, and relying upon these representations Scott accepted the certificate and continued to hold it until the bank closed.

In September, 1890, and for many months prior thereto and ever afterwards the bank was wholly insolvent and had no surplus whatever. Its capital was all lost and much more besides. It was earning no dividends. Only two-thirds of the attempted increase was ever paid for, and the officers of the bank made false entries in the books and records of the bank for the purpose of showing an apparent surplus and from this surplus declared a large dividend to themselves and turned in this dividend in pretended payment for about one-third of said increased stock. "The whole transaction was a sham and was done for the purpose of bolstering up an insolvent institution, by obtaining large sums of money from the subscribers for the increased stock and for the further purpose of watering the capital stock of said bank and permitting the officers thereof to appropriate to themselves, without paying anything therefor a large part of said pretended increase." (Transcript of Record, fol. 11.)

On January 17, 1891, the comptroller of the currency issued his certificate and certified that the bank had increased its capital to $250,000, that the

increase had been paid in in full and approved the increase. He based his action wholly upon a notification received from the bank that the whole amount of the proposed increase had been paid in, and at the time he approved the increase he knew "that more than the entire capital of said bank was then loaned to its president, and that the amount so loaned had been constantly increasing for several years up to said January 17, 1891, by adding interest, which was not paid to the notes evidencing such loans on the renewals thereof." (Transcript of Record, fol. 9.)

The bank continued to do business with a pretended capital of $250,000 down to the time when it closed its doors on May 4, 1894—a little less than 3 years and 4 months, and during this time it paid dividends amounting to 18 per cent, these dividends being paid out of the money paid in by the subscribers for new stock.

Of the false and fraudulent representations and acts of the bank Scott had no knowledge whatever until long after the bank had closed its doors, nor had he any information whatever that could in any way have created a suspicion thereof.

"The books and records of said bank during all the time after said Oct. 25, 1890, have shown and it has been made by them to appear that all of said pretended increase of capital was paid in; that from a time prior to said Oct. 25, 1890, until said bank closed, the books and records of the bank were systematically, skillfully and cunningly falsified by said officers and so kept that the defendant could

not, by the *utmost diligence*, ascertain the true condition of said bank." (Transcript of Record, fol. 11.)

As soon as Scott discovered that the full amount of the increase had not been paid in he disclaimed and denied that he was or ever had been a stockholder. The answer contains the usual allegations of deceit. Scott never had any interest in or connection with said bank except as herein stated.

In the Circuit Court the receiver moved for judgment on the pleadings and the same was granted. No opinion was filed by the Circuit Court. Scott sued out a writ of error to the Circuit Court of Appeals for the Eighth Circuit, the majority of which Court affirmed the Circuit Court, and by writ of error the questions involved are now before this Court.

It is claimed by plaintiff in error that the facts set out and admitted in the pleadings show: 1st. That the pretended increase of capital of the bank was invalid and that plaintiff in error never became liable as a stockholder. 2nd. That the fraudulent misrepresentations which induced the plaintiff in error to contract for the shares of new stock, which were issued to him, entitle him to repudiation and rescind that contract; 3rd. That the subscription of plaintiff in error was made dependent upon the existence and performance of certain conditions which never existed and have never been performed and therefore his subscription never ripened into stock ownership. These questions are brought before this Court by the following

ASSIGNMENTS OF ERROR:

First. That the Court erred in holding that where the stockholders of a National bank decide, with the approval of the comptroller, to increase the capital stock therein by a named amount, the clause of Revised Statutes, Chapter 5142, to the effect that no increase shall be valid until the whole amount is paid in does not create a condition, express or implied, that shares subscribed and paid for in full are not to be held valid unless the entire amount of the proposed increase is subscribed and paid for in full, but refers only to the actual increase created by a subscription for a given number of shares, which must be paid for in full to render it valid.

Second. The Court erred in holding that the amount of the proposed increase decided upon and approved by the comptroller merely fixes the maximum increase authorized, and each subscription thereto when paid up in full becomes valid and binding until such maximum is reached.

Third. The Court erred in holding that the liability of a stockholder in a National bank for assessments made by the comptroller on its insolvency is not dependent upon the contract of subscription between the stockholder and the corporation, but is created by statute for the benefit of the bank's creditors, and can neither be modified nor released by any act of the corporation.

Fourth. The Court erred in holding that one who has been induced by false representations of its officers to subscribe to the increased stock of a

National bank, though without knowledge of the fraud or means of ascertaining it, cannot after the bank has been placed in liquidation exercise his option to rescind the contract of subscription as against the bank's creditors.

Fifth. The Court erred in holding that the facts alleged in the answer did not constitute a defense to the cause of action stated in the complaint.

ARGUMENT.

1. *No valid increase of capital stock was ever made since the whole amount of the proposed increase was not paid in.*

Of the principal questions in this case, the first involves the interpretation of Sec. 5142, Rev. Sts. U. S., relating to National banks. This section is as follows:

"Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association shall be determined by the comptroller of the currency; *and no increase of capital shall be valid until the whole amount of such increase is paid in, and* notice thereof has been transmitted to the comptroller of the currency, *and* his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association."

It was as to the effect of the clause italicized above, so far as this statute is concerned, that the Court below divided. It is claimed by plaintiff in error that this Court has heretofore stated what the object of this statute was; how it may be violated; what is necessary to a valid increase of stock; and what conditions precedent must *concur* before any valid increase of stock in a National bank can be made.

"The clause in question" (Sec. 5142 *supra)* "was intended to secure the actual payment of the stock subscribed, and so to prevent what is called watering of stock."

Aspinwall v. Butler, 133 U. S. 595.

In the same case and in the same part of the opinion the Court said:

"This clause would have been violated by an issue of $500,000 of new stock when only $461,300 was paid in, but not by an issue of the exact amount that was paid in."

" 'Three things must concur to constitute a valid increase of the capital stock of a national banking association. First, that the association in the manner pointed out in its articles, and not in excess of the maximum prescribed by them, shall assent to an increased amount; second, that the whole amount of the proposed increase shall be paid in as part of the capital of the association; and third, that the comptroller of the currency, by his certificate specifying the amount of such increase of cap-

ital stock, shall approve thereof and certify to the fact of its payment.'"

Delano v. Butler, 118 U. S. 634, 649.

In the majority opinion below the interpretation of this statute (Sec. 5142) is worked out by first laying down four principles of statutory construction, found at folio 24, page 21, of the Transcript of the Record. We take no issue with these principles, but claim there is either no place for their application in this case, or that the majority of the Court below failed to apply its own rules to the case at bar.

It can hardly be held that the construction contended for by plaintiff in error, and so ably and clearly sustained in Judge Sanborn's dissenting opinion, is absurd or unjust or oppressive. The majority opinion, however, at folio 24, page 22 of the Transcript of Record, says: "Under the doctrine of these cases it is clear that in construing the particular clause of Section 5142, which declares that no increase of the capital stock shall be valid until the whole amount of the increase shall have been paid in, we must regard not only the words of the special clause, but also the other provisions of the entire act and the effect which a given construction will have upon the admitted or undoubted purposes of the statute as a whole." Section 5140, pertaining to the *original organization* of National banks, is then considered and at folio 25, page 23, the majority opinion says: "The argument of the defendant asks too much. It

would apply to the original capital of a company as well as to an increase of capital." We most respectfully suggest that this conclusion is wholly unwarranted and that the reason the majority so concluded was because it *did not follow the principle it had asserted, to-wit, construe Section 5142 "together with the provisions of the entire act."*

The bearing of the sections provided for the organization of banks upon the section provided for increase of capital was not argued before the Court below, and it is evident that the majority was not fully advised as to the statutes relating to organizations of banks. Had it considered Sections 5168 and 5169 of the act, together with 5140, the distinction between organization and increase of capital would have plainly appeared. By Sections 5168 and 5169 the comptroller is made a special tribunal "to examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital," etc., and when it appears to the comptroller "that such association is lawfully entitled to commence the business of banking," etc., the comptroller shall issue his certificate authorizing the commencement of business. The findings of the comptroller after his examination and investigation is, in case of organization, conclusive on the stockholders. Further, there is no express condition precedent that none of the stock of the newly organized bank shall be valid unless fifty per cent is paid in. On the other hand, the statute providing for increase of capital does not constitute the comptroller a tribunal to

examine and determine whether the law had been complied with. He issues his certificate upon a mere notice—not even a sworn statement—from the bank that the law has been complied with, and his certificate is by the statute expressly made one of three conditions which must *concur,* as this Court has said in *Delano v. Butler, supra.* The Court below was unanimous that the comptroller's certificate was not conclusive in the matter of validity of increase. It did not even think the point, though urged upon the Court, was worthy of reference in its opinion and treated it just as this Court did when urged before it in *Delano v. Butler,* that is, as unworthy of consideration.

It would appear from the majority opinion in the Court below that it thought the decision of this Court in *Delano v. Butler,* 118 U. S. 634, had been modified by the subsequent cases of *Aspinwall v. Butler,* 133 U. S. 595; *Pacific National Bank v. Eaton,* 141 U. S. 227, and *Thayer v. Butler,* 141 U. S. 234, all cases growing out of the failure of the Pacific National Bank. But we submit that this Court has not modified by these later decisions the position it took in *Delano v. Butler, supra.*

Briefly stated, the facts in the Pacific Nat. Bank cases were as follows: It was voted to increase the capital of the bank from $500,000 to $1,000,000. Only $461,300 of the new capital was subscribed for and paid in. At the request of the directors, and with the sanction of a large majority of the stockholders the increase of capital was limited to the sum paid in, *i. e.,* $461,300, and that amount of in-

crease approved by the comptroller of the currency. The eleventh section of the by-laws of the bank provided that "if any stockholder fail to subscribe for the amount of stock to which he may be entitled, within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock." The bank failed and those who subscribed for the new stock, when sued for assessments, defended on the ground, among others, that the new stock was invalid because the whole amount thereof had not been subscribed for and paid in. The subscription was held valid because, under the by-law, the directors had power to act in regard to the amount of the increase and in regard to the disposition of shares not subscribed for. No stock was issued that was not paid for. All the parties sued were old stockholders of the bank who subscribed for the new shares.

We submit that this Court has not only not modified, but has reasserted in these later cases the principles stated in *Delano v. Butler,* and Judge Sanborn's opinion on this point (folio 41, page 40 of Transcript of Record) seems unassailable. He says:

"I do not understand that the Supreme Court has modified or departed from its holding in the later cases of *Aspinwall v. Butler,* 133 U. S. 595; *Pacific Nat. Bank v. Eaton,* 141 U. S. 227, and *Thayer v. Butler,* 141 U. S. 234. In each of those cases the amount of increase originally proposed was $500,000, but only $461,300 was actually subscribed and

paid in. When this has been done, the bank modified its proposal, limited the amount of its increase to $461,300, notified the comptroller that this amount has been subscribed and paid in, and he issued his certificate for, and approved the increase, not of $500,000, but of $461,300. In this state of facts, the court held the increase valid. The key to these decisions is found, however, in the holding of the Court in *Delano v. Butler*, that the three conditions of the act of Congress had been exactly fulfilled. It said: 'In the present case the association did, in fact, finally assent to an increase of the capital stock, limited to $461,300; that amount was paid in as capital, and the comptroller of the currency by his certificate approved of the increase, and certified to its payment; so that there seems little room to question the validity of the proceeding resulting in such increase. All the requisitions of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000 subsequently reduced to the amount actually paid in, does not seem to affect the question, for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the comptroller of the currency.' 118 U. S. 649."

But we are confronted with another proposition. Section 5142, it is claimed, is so modified by Section 1 of the act of May 1, 1886, that "each subscription for portions of such increase when paid

up in full becomes valid and binding until the maximum is reached, and the statute does not incorporate into such subscriptions a condition that the subscriber, paying his subscription in full, cannot become a holder of valid stock unless the maximum amount of the proposed increase is subscribed for and paid in." (Folio 28, page 26, Transcript of Record.)

Section 1 of the act of May 1, 1886, (24 Statutes at Large, 18) provides:

"That any national banking association may, with the approval of the comptroller of the currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock in accordance with existing laws, to any sum approved by the said comptroller, notwithstanding the limit fixed in its original articles of association and determined by said comptroller; and no increase of the capital stock of any national banking association, either within or beyond the limit fixed in its original articles of association, shall be made except in the manner herein provided."

The amendatory statute in no wise repeals Sec. 5142. It only adds thereto the requirement that the increase must be voted by the owners of two-thirds of the stock.

Winters v. Armstrong, 37 Fed. 508.

McFarlin v. First Nat. Bank, 68 Fed. 868.

In the case at bar two-thirds of the stockholders never voted for any increase except for the sum of $150,000. That was the amount selected by the

stockholders and that was the amount which the comptroller approved. Only $100,000 was paid in, $50,000 was watered stock. The stockholders never reduced the increase from $150,000 to $100,000, nor did the comptroller ever approve any such reduction. The only certificate given by the comptroller —one of the three conditions required—was a certificate specifying the amount of increased capital as $150,000. The statute says, "and no increase of capital shall be valid until the *whole* amount of *such* increase is paid in and" the comptroller's "certificate obtained, specifying the amount of *such* increase of capital stock," etc. The certificate of the comptroller specifies the amount of "*such increase*" as $150,000, and "no increase of capital shall be valid until the *whole* amount of *such* increase is paid in." How, then, can, as the majority below say, "each subscription for *portions* of *such* increase, when paid up in full" become "valid and binding." This Court in *Delano v. Butler, supra,* said that one of the necessary conditions for valid increase of stock was, "* * * second, that the whole amount of the *proposed* increase shall be paid in as part of the capital of the association."

It is further claimed that any construction of Section 5142, other than that given by the majority of the Court below, would work great injustice. At folio 27, page 25 of the Transcript of Record, speaking of defendant's contention, it said: "If this contention is well founded, then, as already said, it follows that if all the shares but one had been subscribed and paid for, nevertheless the holders of

the certificate for the full-paid shares could not be heard to assert that they were the owners of valid shares, which would be a most unjust result." Can we not, with equal right, say that, if the only increase proposed and the only increase specified by the comptroller is for $150,000.00, it would be great injustice to hold the whole amount of $150,000.00 valid stock when only $100.00 had been paid in? Can we not, with equal right, say that with such proposed increase of $150,000.00, it would be great injustice to hold that the person, who had taken one share and paid $100.00 under the express condition, as was the case at bar, that the whole $150,000.00 should be paid in, must keep this one share because it is valid, while the other $149,900, being invalid stock, must be cancelled? It is pretty hard to find any statute so perfect that imagination cannot conceive its working injustice to some individuals under some circumstances. But we maintain that the statute as interpreted in the dissenting opinion will cause less injustice than as interpreted in the majority opinion of the Court below. As this Court has said, it was to prevent watering of stock in National banks that this statute was enacted. It was to prevent frauds upon innocent subscribers to stock and to prevent banks doing business on fictitious capital that this statute was enacted, and can this be prevented by holding such fictitious stock to be valid? Congress has said such stock shall not be valid. It has so said in plain, unmistakable and emphatic words. It has not so said in ambiguous terms. What right has a

court to go outside of the plain words of a statute in order to read its own ideas of convenience and justice into a law? There is a fundamental principle of statutory construction which is often overlooked. It was stated by Mr. Justice Harlan as follows:

"Where the language of a statute is plain and unambiguous, it is the duty of the court to enforce it according to the obvious meaning of the words without attempting to change it by adopting a different construction, based upon some supposed policy of Congress in regard to the subject of legislation or upon consideration of injustice or inconvenience arising from the enforcement of the statute according to its terms." *Bates Refrigerating Co. v. Sulzberger,* 157 U. S. 1.

Another principle was stated by this Court in *Montclair v. Ramsdell,* 107 U. S. 152, as follows:

"It is the duty of the court to give effect if possible to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."

We submit that this statute should be interpreted "according to the obvious meaning of the words," and that, as even learned judges differ as to the injustice and inconvenience arising from the enforcement of the statute according to its terms," there is no occasion here for a construction based upon supposed injustice, inconvenience or oppression.

2. *Plaintiff in error is entitled to a rescission of his subscription contract.*

In reachingthe conclusion that plaintiff in error was not entitled to a rescission the majority of the Court of Appeals based that conclusion largely upon the premise that the liability of a stockholder to pay an assessment is "not dependent upon the terms or in fact upon the existence of a contract of subscription to the capital stock of the bank, but it is a liability imposed by statute in favor of creditors," (Transcript of Record, fol. 31, Judge Shiras' opinion); that "suits of this character, strictly speaking, are not actions based upon the contract of subscription existing between the corporation and the stockholders," (Transcript of Record, fol. 30), and "as already said, this suit is not based upon the contract of said subscription between the bank and the plaintiff in error and is not, therefore, an action wherein the issue can be made as to the voidability of that contract as between the bank and the shareholders." (Transcript of Record, fol. 33.)

This Court, in *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, and in *Whitman v. National Bank of Oxford*, 20 S. C. Rep. 479, has distinctly held that "the liability of a stockholder to an additional amount equal to his stock, though created by statute, is contractual in its nature."

Judge Sanborn, in his dissenting opinion, in reaching the conclusion that Scott is entitled to rescission, recognizes the contractual nature of the stockholders' liability; his opinion upon the ques-

tion of rescission is so comprehensive that we are satisfied to here reproduce it without addition or comment:

"The case made by the pleadings is this: In 1890 the plantiff in error was a stranger to the bank, free from all connection with or relation to it, and ignorant of its financial standing and character. The bank was insolvent, was earning no dividends and had no surplus. To induce the plaintiff in error to purchase some shares of a proposed increase of its worthless stock, the bank falsely represented to him that it was solvent and in a flourishing condition, that it was earning dividends on its stock, that it had a surplus of $50,000 above its capital stock and liabilities, and that its stock was worth a premium of $8.00 per share. By these misrepresentations it induced him to subscribe for 50 of the 1,500 shares it proposed to issue and to deposit with it $5,400 under an understanding that this money should be applied to the payment for this stock when the whole amount of the increase of stock was subscribed for and paid in. The entire amount was subscribed for, but only two-thirds of this increase was ever paid in. The bank then appropriated the plaintiff's $5,400 in payment for the 50 shares of stock, sent him a certificate of it, and induced him to play the role of a stockholder by the false representation that the entire increase had been paid in, and by the same false representation induced the comptroller of the currency to issue his certificate and approve the increase. At the same time it so falsified its books that the plain-

tiff in error could not by the utmost diligence learn the true condition of the bank. All this was done in October, 1890. But the bank continued to falsify its books, and to conceal the truth so that the plaintiff in error had no suspicion of the fraud and could not discover it by any reasonable diligence until after he had received two dividends on his supposed stock and the bank had closed its doors in 1894. Here is a case where a bank by the grossest false misrepresentations has induced a stranger to pay $5,400 and to incur a liability for $5,400 more, for a certificate of worthless stock that furnished no consideration for the contract. It is difficult to conceive of a grosser fraud. Upon every principle of equity and justice this subscriber was entitled to repudiate this purchase, to rescind his contract, and to recover back his money as soon as he discovered the facts. Contracts for stock in a corporation which are induced by fraud create no obligation, and the victim of the fraud has the right to their abrogation. *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 190; *Thompson's Liability of Stockholders*, Sec. 142.

It is true that this contract was voidable and not void and that the duty to rescind it as soon as the facts were discovered, or as soon as they could be discovered with reasonable diligence, was imposed upon this subscriber. But he avers in his answer, and this allegation stands admitted in this record, that the bank, systematically, skillfully and cunningly falsified its books, concealed the facts, asd continued its false representations until it closed

in May, 1894, so that he could not with the utmost diligence discover the fraud,and so that he had no suspicion of it. How can he be said to be guilty of such negligence or laches as will deprive him of relief in the face of these facts? The statutes of the State of Missouri, where this fraud was perpetrated, provide that an action for relief on the ground of fraud may be brought at any time within five years ater the discovery by the aggrieved party, within ten years, of the facts constituting the fraud (Rev. Stat. Mo., 1889, Sec. 6775), and it is a familiar maxim that no time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals it. Scheftel v. Hays, 58 Fed. Rep. 457, 460, 7 C. C. A. 308, 312, 19 U. S. App. 220. 226; Kelley v. Boettcher, 85 Feb. Rep. 53, 63. I am unable to escape conviction that under this state of facts this subscriber was entitled to rescind the purchase of, and to repudiate the liability upon this stock.

It is conceded in the opinion of the mapority that as against the bank the plaintiff in error would be entitled to this relief, but it is insisted that by his delay in seeking it, and by his receipt of two dividends he is estopped from obtaining it as against the receiver, because the latter represents the creditors of the bank as well as the bank itself. In support of this view the cases of Chubb v. Upton, 95 U. S. 665, Veeder v. Mudgett, 95 N. Y. 295, Stutz v. Handley, 41 Fed. Rep. 531, Pauly v. State Loan & Trust Co., 165 U. S. 606, and Keyser v. Hitz, 133 U. S. 138, are cited. But there seems to me to be a radi-

cal difference between the standing of the subscriber in this case and that of the subscribers in Chubb v. Upton, Keyser v. Hitz, Upton v. Tribilcock, 91 U. S. 45, Sanger v. Upton, 91 U. S. 56, 63, and other cases of that class. In this case the plaintiff in error was induced to purchase by a gross and continuing fraud which kept him in ignorance of the facts, and rendered it impossible for him to discover them by the use of reasonable diligence. In those cases the subscriptions were not induced by fraudulent, continued and successful misrepresentations and concealments of material facts which lulled suspicion and hid the truth, but the defenses were the defective exercise of the power to issue stock as in Chubb v. Upton, the defective transfer of stock as in Keyser v. Hinz and Sanger v. Upton, 91 U. S. 63, a misrepresentation as to the legal effect of the stock certificate which purported to be nonassessable, which was held to be a misrepresentation of a matter of law and unavailable, as in Upton v. Tribilcock, 91 U. S. 45, 50, the fact that an increase of stock was irregularly, but not fraudulently issued and knowingly retained, as in Veeder v. Mudgett, 95 N. Y. 295, 310, and Stutz v. Handley, 41 Fed. Rep. 531, that subscribers or pledgees knowingly held themselves out as owners of stock "in such way and under such circumstances as upon principles of fair dealing will estop them as against creditors from claiming that they were not in fact owners" as was said in speaking of supposed cases in Pauly v. State Loan & Trust Co., 16 U. S. 606, 623, and that subscriptions were knowingly ratified and

adopted after full knowledge of the falsity of the statements which induced them, as in Ogilvie et al. v. Knox Ins. Co. et al., 22 How. 380, 390. In these cases the subscribers or holders were held to be estopped as against the creditors because they continued to act as stockholders after they knew, or by the exercise of reasonable diligence might have known the facts. None of them were tricked into the place of stockholders and retained there by a continued fraud which kept them in ignorance of, and rendered it impossible for them to learn the truth by the exercise of reasonable diligence, as the plaintiff in error was in the case at bar. This is the radical distinction between the cases referred to and that in hand. It separates by as wide a difference the cases of Scovill v. Thayer, 105 U. S. 193, Sawyer v. Hoag, 17 Wall. 610; Albany v. Burke, 11 Wall. 96, Burke v. Smith, 16 Wall. 390, Mumma v. Potomac Co., 8 Pet 281, Delano v Butler, 118 U. S. 634, National Bank v. Case, 99 U. S. 628, Bowden v. Johnson, 107 U. S. 251, and Potts v. Wallace, 146 U. S. 689, 703, cited in the opinion of the majority. It is held in those cases that those who knowingly permit themselves in various ways to appear to be stockholders, those who were stockholders but presented the false appearance that they were not, and those who fraudulently transferred their stock to irresponsible parties to escape liability were estopped from defeating creditors of the corporation in their attempt to hold them as such. It is indeed repeatedly said in those cases that the property of an insolvent corporation and the liabil-

ity of the stockholders is a trust pledged for the benefit of the creditors, and that is equally true of every insolvent person. But in none of these cases, in no case cited by the court or the counsel was the holder of the stock duped into his place and liability by undiscovered fraud. In none of them did any court hold that money obtained from, or liability imposed upon, a stockholder by fraud which he could not discover, was a trust fund held for the benefit of the creditors of the corporation which perpetrated the fraud. Can a debtor by fraud confer upon his creditors any greater right to the property or liability of his victim than he gets himself? In the opinion of the majority this question is propounded: "If A., being the owner of fifty shares of the capital stock in a bank, should induce B. to purchase the same through false representations with respect to the financial condition of the bank, the stock being transferred to B. on the books of the association, could B., if the bank subsequently failed, escape liability to the creditors on the ground that he had been induced to purchase the stock through the false representations made by A.?" In my opinion, in the absence of other proof of an estoppel *in pais*, the question should be answered in the affirmative, because fraud avoids every purchase, every sale, every contract, as against every one but an innocent purchaser or creditor who has taken his place in reliance upon it. That, however, is not the question in this case. The question here is: Could the assignee or receiver of B's property, in the case of the sale supposed, enforce a non-nego-

tiable obligation of A., which B. had induced him to make by the fraudulent misrepresentations? Regarding the answer to this question it seems to me there ought not to be two opinions. If a debtor procures goods by false representations, the right of the defrauded vendor to recover them are always superior to those of the creditors of the vendee or the receiver who represents them. *A fortiori* if, by the fraudulent representations by which he sells his goods, he procures an assumption of liability by the vendee, the right of the latter to a rescission of the sale and a cancellation of the obligation is superior to the rights of either his creditors or his receiver to enforce it. Beach on Receivers, Sec. 704; Litchfield Bank v. Peck, 29 Conn. 384, 386; Bussing et al. v. Rice, 2 Cush. 48; Rohrbough v. Leopold, 68 Tex. 254, 258; Root v. French, 13 Wend. 570, 573; Barnard v. Campbell, 58 N. Y. 73; Slagel v. Goodnow, 45 Minn. 531; Oswego Starch Factory v. Lendrum, 57 Ia. 573, and cases there cited; Atwood v. Dearborn, 1 Allen 483; Devoe v. Brandt, 53 N. Y. 462, 465; Benjamin on Sales § 433, Note I. Why is not the right of one who is induced by the fraudulent misrepresentations of a bank to buy stock, to a rescission of that sale and a release of the liability it imposes, superior to the claims of its creditors or its receiver to enforce them? Fraud vitiates every contract based upon it. A contract of subscription for, or purchase of, stock, is no exception to the rule, and the relation and liability of a stockholder cannot exist without the existence or an estoppel from denying the existence, of the

contract of subscription or purchase. It is true, as is shown in Scovill v. Thayer, and other cases citted, that the stockholders' liability and the maintenance of the action upon it is not dependent upon the terms of the contract of subscription where those terms are in conflict with the law or the statute, as was the contract that the stock was nonassessable, but the existence of a valid contract of subscription or an estoppel from denying its existence is a *sine qua non* to the existence of the liability and the maintenance of the action. Without it there can be no stockholder, and hence, no liability of a stockholder. And, where the contract is induced by fraud, and is rescinded without negligence or delay as soon as the facts constituting it are discovered, it is as though it had not been, and there remains neither contract nor stockholder, nor liability of a stockholder. In all the cases that have been cited in which the liability was enforced a contract of subscription of purchase which had not been induced by fraud, or which had been ratified after its discovery, existed, and the stockholders in those cases were held because, as was well said in Pauly v. State Loan & Trust Co., 165 U. S. 606, 623, they were the real owners of the stock or held themselves out or "allowed themselves to be held out as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not in fact, owners." But one who is induced by a continuing fraud to subscribe for, or to purchase and to retain stock is not estopped as against creditors on prin-

ciples of fair dealing from repudiating the contract and liability when he discovers the facts, because he has never knowingly or negligently deceived them to their injury. So are the American authorities that have treated of such fraudulent contracts, (Newton National Bank v. Newbegin, 40 U. S. App. 1, 20 C. C. A. 339, 74 Fed. Rep. 135; Florida Land & Improvement Company v. Merrill, 52 Fed. Rep. 77, 80; Upton v. Thibilcock, 91 U. S. 54; Winters v. Armstrong, 37 Fed. Rep. 516, 517; Duffield v. Barnum, 31 N. W. Rep. (Mich.) 310, 316), and they clearly mark and strongly emphasize the distinction between the cases relied upon in the opinion of the majority and that now before us. In all the cases cited by the majority either a valid contract of subscription or purchase existed, or the stockholders were estopped from rescinding a voidable contract because they had acted as such after they knew or might have known the facts upon which they relied to avoid it. In the case at bar the contract was induced by fraud and it was concealed by fraud. In this case no estoppel against the plaintiff in error can be sustained because he did not know, and could not learn the facts, and no duty to speak or act rested upon him until he acquired that knowledge or means of knowledge. It may be that upon a trial of this case evidence could be adduced which would estop him from repudiating the purchase of this stock, but upon the admitted allegations of his answer here, there are several reasons why I think he is not barred as against this receiver and the creditors he represents from obtaining the relief he seeks.

An estoppel arises only when one knowingly or negligently represents to another who is ignorant and relies and acts upon the representation to his injury that a fact or condition exists, which has no existence. An essential element of such an estoppel is a wilful intent to deceive, or such gross negligence of the rights of others as is tantamount thereto. There must be some moral turpitude or some breach of duty. Henshaw v. Bissell, 18 Woll. 255, 271; Bank v. Farwell, 58 Fed. Rep. 633, 636, 639, 7 C. C. A. 391, 394, 396, 19 U. S. App. 256, 262, 265; N. Y. Life Ins. Co. v. McMaster, 87 Fed. Rep. 63, 66. Mr. Justice Field, speaking of his estoppel in Henshaw v. Bissell, says: "For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to the amount to constructive fraud. An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal right to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's right have no such ingredient, and seldom work any such result." As long as the plaintiff in error did not know and could not learn by the use of reasonable diligence the facts constituting the fraud upon him until after the bank had incurred its debts to all its creditors, he was not guilty of any breach of duty to them or of any negligence of their rights, or of any intent to

deceive them and they cannot sustain the plea of an estoppel against him.

Another requisite ingredient of an estoppel by conduct or declarations is, that the party claiming its benefit has acted upon it in such a way, that he will be injured if the natural inference from it is denied. The deceit of the victim of the representations and consequent damage from their denial are indispensable to the existence of the estoppel. N. Y. Life Ins. Co. v. McMaster, 87 Fed. Rep. 63, 66; Bonsack Machine Co. v. S. F. Hess & Co., 68 Fed. Rep. 119, 135, 15 C. C. A. 303, 318, 25 U. S. App. 315, 341. There is nothing in this record to show that any creditor of this bank loaned his money to it or deposited his funds with it in reliance upon the fact that the plaintiff in error appeared to own fifty shares of stock in it, and I am aware of no presumption of law or of fact which makes it our duty to reach this conclusion in the absence of pleading and proof.

Moreover an estoppel does not operate in favor of everybody. No one can set it up or derive any benefit from it, who has not been misled by the misrepresentation or conduct to his injury. Ketchum v. Duncan, 96 U. S. 659, 666; The Howard Carrol, 14 U. S. App. 506; Harris in re., 57 Fed. Rep. 243, 246, 6 C. C. C. 320. If it were conceded that a creditor of the bank who was induced to become such by his reliance upon the fact that the plaintiff in error appeared to have fifty shares of stock could estop him from escaping from a liability thereon, that estoppel could not inure to the benefit of any creditor

who was not induced to become such, in reliance upon that fact. If there were some creditors who were, and some who were not induced to become such in reliance upon this fact, the receiver could not derive any benefit from it in this suit because he can enforce only the common rights and claims of individual creditors, and he cannot plead or urge the personal claims of individual creditors which are not common to all. He cannot enforce an estoppel which may belong to one-third or one-tenth of the creditors and distribute the proceeds he derives from it among them all. The right of a creditor to enforce such an estoppel is a personal right which no one but the creditor misled by the representation can urge and the receiver cannot avail himself of it, unless all the creditors have been induced to loan their money to this bank by the apparent ownership of its stock by the plaintiff in error. There is neither plea nor evidence of such a state of facts in this case. Indeed the pleadings show that when this stock was subscribed, the bank owed more than the value of all its assets. A state of things once shown to exist is presumed to continue, and where, as in this case, it appears that a bank owed more than the value of all its property in 1890 and again in 1894, the presumption that it had paid all of its creditors and become indebted to new ones during this four years would be contrary to the common experience and observation of business men, violent and unreasonable. The strong probability is, that most of the creditors of this bank loaned their money to it prior to 1890, and they surely cannot plead an

estoppel. Whether they did or not, I am strongly of the opinion that the plaintiff in error is entitled to pleading and proof that some or all of these creditors loaned their money in reliance upon his ownership of the stock before an estoppel against him is found. "A creditor who has been defrauded by misrepresentation of the real capital of the company has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders, who have taken no part in it." Scovill v. Thayer, 105 U. S. 143, 151.

Finally, even if the fact were established that a creditor loaned his money since 1890 in reliance on the ownership of the stock of the plaintiff in error, I am unable to perceive any right or equity in his claim superior to that of the plaintiff in error. In that case they were both deceived by the same fraud. They were both kept in ignorance of the actual facts by the same falsifications and devices, and I see no reason why one of the victims of such a wrong should be allowed to prey upon the other. The bank induced the plaintiff in error to play the part of a stockholder, and thereby to lose all the money he deposited with it and to run the risk of liability to lose as much more by the same scheme of false representations of its solvency, of its flourishing condition, and of its increase of stock which doubtless induced the creditor to take the bank's promise of repayment for the money he deposited with it. In such a case, why should not the right of the pur-

chaser of stock who suffers the greater wrong, be equal to that of the creditor who suffers less? Neither of them did or could discover it, until both were injured. Neither of them knowingly or negligently deceived the other, and in my opinion neither of them is entitled to estop the other from undoing the fraud from which they suffer. Newton Nat. Bank v. Newbegin, 74 Fed. Rep. 135, 140, 20 C. C. A. 339, 344; Florida Land, etc., Co. v. Merrill, 52 Fed. Rep. 77, 80, 2 C. C. A. 629, 632; 2 U. S. App. 434, 439, 440; Upton v. Tribilcock, 91 U. S. 45, 54; Winters v. Armstrong, 37 Fed. Rep. 512, 516, 517; Duffield v. E. T. Barnum Wire & Iron Works, 31 N. W. Rep. (Mich.) 310, 316.

3. *The only contract made by Scott was a subscription for 50 shares of valid stock of a proposed increase of $150,000 of valid stock.*

Defendant subscribed for shares of the proposed increase of $150,000.00. The law requires that a subscriber pay his money into the bank before the stock is created. The defendant subscribed to this increase and paid his money in with the understanding and agreement and with the conditions precedent to the obligation becoming binding upon him as a subscriber, that all of this $150,000.00 be subscribed for and that it all be paid in. Defendant's subscription was a conditional subscription and the conditions imposed are not only not in fraud of the law, but actually imposed by the law. It is admitted that these conditions were never performed by the bank and the pleadings show that performance was

never waived. Scott never consented to be bound by any subscription contract except the one requiring that $150,000.00 of new stock be subscribed for and paid in. That is the only contract, too, of which the receiver here can avail himself in this action. The court cannot make a contract of subscription. It must deal with the defendant as it finds him, either as a stockholder or not as a stockholder. It cannot make a new contract of subscription in order to make stockholders. It cannot make a conditional subscription unconditional, so long as the conditions are valid and not against public policy. So far as the rights of this receiver with reference to Scott are concerned he stands in exactly the same position as the bank itself stands when it is a question of whether or not a subscription contract has ripened into stock ownership. (Winters v. Armstrong, 37 Fed. 521; Eaton v. Pacific Nat'l., 144 Mass. 260, 10 N. E. 850; McFarline v. 1st Nat'l., 68 Fed. 868.

Respectfully submitted,

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H. F. STEVENS,

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Of Counsel.

No. 148.

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JAMES H. MCKENNEY
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Brief of Stipulation for Statement, Brief and Argument of Defendant in Error.

Supreme Court of the United States

Filed Nov. 20, 1900.

October Term, A. D., 1900.

No. 148.

GEORGE H. SCOTT, *Plaintiff in Error,*

vs.

PARRY L. DEWEESE, (SUBSTITUTED FOR W. A. DAVIDSON) RECEIVER OF THE FIRST NATIONAL BANK OF SEDALIA, MISSOURI, *Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

WM. H. SIMMONS,

Counsel for Defendant in Error.

IN THE

Supreme Court of the United States

October Term, A. D., 1900.

No. 148.

GEORGE H. SCOTT, - - - - *Plaintiff in Error,*

vs.

PARRY L. DEWEESE, (SUBSTITUTED FOR W. A. LATIMER) RECEIVER OF THE FIRST NATIONAL BANK OF SEDALIA, MISSOURI, - - *Defendant in Error.*

Statement of Case by Defendant in Error.

THE PETITION

alleges sixteen distinct facts, constituting plaintiff's cause of action, namely:

1st. The incorporation and organization of the First National Bank of Sedalia, Missouri.

2nd. The extension of the period of its succession and existence for twenty years, from October 20th, 1885.

3rd. That said First National Bank of Sedalia, Mis-

souri, from that time until its failure on the 4th day of May, 1894, continued to do a banking business.

4th. That on September 6th, 1890, said bank increased its capital stock to two hundred and fifty thousand dollars ($250,000).

5th. That on January 17th, 1891, the Comptroller of the Currency did certify that said bank had so increased its capital stock and did approve said increase.

6th. That the Comptroller of the Currency did on said 17th day of January, 1891, certify that such increase had been fully paid in as a part of the capital stock of said bank.

7th. That thereafter said bank did continue to do business on a capital stock of two hundred and fifty thousand dollars ($250,000).

8th. That on May 4th, 1894, said bank became insolvent and closed its doors and ceased to do business.

9th. That on May 10th, 1894, the plaintiff, Latimer, was appointed receiver of said bank by the Comptroller of the currency.

10th. That he duly qualified as such receiver and is engaged in winding up the affairs of said bank.

11th. That the Comptroller of the Currency of the United States afterwards determined that in order to pay the debts of said Association, it was necessary to enforce the individual liability of stockholders to the extent of seventy-five per cent. of the par value of their stock.

12th. That on April 13th, 1895, the Comptroller of the Currency made an assessment upon the shareholders of said bank for the sum of one hundred eighty-seven thousand five hundred dollars ($187,500.00), to be paid by them ratably on or before May 5th, 1895.

13th. That plaintiff made a demand upon the defendant for said assessment.

14th. That at the date of the failure and suspension of said bank, defendant was the owner of twenty-five shares of said stock of the par value of two thousand five hundred dollars ($2,500).

15th. That the plaintiff notified the defendant of said assessment and requisition of the Comptroller of the Currency and demanded payment of the same.

16th. That the defendant has not paid said assessment. (Admitted by answer as there is no plea of payment).

THE ANSWER

contains the following specific admissions of the allegations of the petition, namely:

1st. Admits the incorporation and organization of the First National Bank of Sedalia Missouri.

2nd. Admits the extension of the period of its existence.

3rd. Admits that it continued to do a banking business as alleged in the petition.

4th. That said bank became insolvent and closed its doors as alleged in the petition.

5th. That the plaintiff was appointed receiver of said bank on the 10th day of May, 1894.

6th. That he duly qualified as such receiver and is now acting as such.

7th. That the Comptroller of the Currency determined it was necessary to enforce the individual liability of its stockholders to the extent of seventy-five per cent. of the capital stock held by them.

7½. Admits that the Comptroller determined that it was necessary to collect from them, ratably, the said amount of seventy-five per cent. of the par value of the stock held by them.

8th. That a demand was made upon the defendant for his pro rata share of said assessment and directions given to the plaintiff Latimer to enforce the payment of said amount.

6th. That on September 6th, 1890, by a vote of the owners of two-thirds of the capital stock of said bank, its capital stock was increased one hundred and fifty thousand dollars ($150,000).

10th. Admits that said bank notified the Comptroller of the Currency that the whole amount of said increase had been paid in.

11th. Admits that on January 17th, 1891, the Comptroller issued his certificate stating that the amount of the increase of the capital stock was one hundred and fifty thousand dollars and that the same was paid in.

12th. That thereafter said bank continued to do business with the capital stock of two hundred and fifty thousand dollars.

13th. That defendant subscribed for twenty-five shares, aggregating the sum of two thousand five hundred dollars ($2,500), of said capital stock and received his certificate for the same.

14th. Admits that plaintiff received eighteen per cent. of the par value of said stock from said bank as dividends thereon.

Allegations of New Matter in Answer.

After these admissions, the answer sets up the following new matter as a defense to the cause of action set forth in the petition:

1st. That at the time the Comptroller issued his certificate stating that the capital stock had been increased one hundred and fifty thousand dollars ($150,000), and that the sum had been fully paid into said bank, said Comptroller of the Currency knew that more than the entire capital stock of said bank was then loaned to its president, and that the amount so loaned had been constantly increasing for several years up to January 17th, 1891, by adding the interest to the principal.

2nd. That the Comptroller of the Currency based his

action in issuing his said certificate as to the increase of said capital stock, wholly upon the notification of said bank that said increased capital stock had been subscribed and fully paid in.

3d. That in September, 1890, the officers of said bank informed and represented to defendant that it contemplated increasing its capital stock from one hundred thousand dollars ($100,000) to two hundred and fifty thousand dollars ($250,000). That such increase was desirable on account of the increasing business of said bank, which was in a flourishing condition and earning large dividends, and that it had a surplus of fifty thousand dollars ($50,000) over and above its capital stock and all liabilities; and that from said surplus such dividends would be declared as would make said increased shares worth one hundred and eight dollars ($108) per share; that said representations were false and defendant was deceived thereby, and that relying upon the same he subscribed for fifty share of said increased capital stock; that he paid said bank for said twenty-five shares the sum of five thousand four hundred dollars ($5,400), and on or about October 25th, 1890, he received from said bank fifty shares of said increased capital stock. That said bank then falsely and with intent to deceive defendant, represented that the said increase of capital stock had been lawfully made and that the full amount thereof had been subscribed for and paid in in full; and that defendant deceived by said representations, accepted and retained his said certificate of stock *and has received dividends thereon aggregating eighteen per cent. of the par value of said certificate*, which dividends were paid out of the money paid as aforesaid by defendant to said bank.

4th. That in September, 1890, and for a long time prior thereto and ever afterwards, said bank was wholly

insolvent and at the time said pretended increase of capital was made, all of the capital stock of said bank had been lost and its liabilities irrespective of its capital stock and alleged surplus, exceeded its assets; and that it was earning no dividends upon its capital stock. And that said pretended increased stock was never of any value or validity, *and that only about two-thirds of said increase was ever paid in;* and that the officers of said bank made false entries in the books and records of said bank for the purpose of showing *an apparent surplus and declared a dividend to themselves therefrom, and turned in said dividend to the bank in pretended payment for a large part of said increased stock*; that said increase stock was a sham and done for the purpose of bolstering up an insolvent institution and for the purpose of watering the capital stock of said bank and permitting the officers thereof to appropriate to themselves without paying therefor, a large part of said pretended increase, and that defendant had no knowledge or suspicion of this state of affairs until said bank closed its doors on the 4th day of May, 1894.

5th. That the books and records of said bank during all the time after said October 25th, 1890, have shown, and it was made by them to appear that all of said increase was paid in, and were so systematically and cunningly falsified by said officers, that defendant could not by the utmost diligence ascertain the true condition of said bank; and that defendant, as soon as he discovered that said increase was not fully paid in, disclaimed and denied that he had ever been a stockholder of said bank; that at all of the times stated said bank and the officers thereof, had full notice and knowledge that all the representations made by said bank were false and fraudulent.

Analysis of Allegations of New Matter.

After thus analyzing the petition and the answer, it will be seen that all the allegations of the petition stand admitted, and that the only legal question involved in the case now is, whether the new matter alleged in the answer constitutes any defense whatever, to the cause of action set up in the petition.

The allegations of new matter may be analyzed as follows:

1st. That at the time the Comptroller of the Currency issued his certificate that the capital stock had been increased to two hundred and fifty thousand ($250,000), and that the one hundred and fifty thousand dollars ($150,000) of increased capital stock had been paid in, he knew that the entire capital stock of one hundred thousand dollars ($100,000), had been loaned to the president of said bank and the interest had been added to the principal for several years.

2nd. That the Comptroller had based his action in so certifying wholly upon the notification of said bank that its capital stock had been so increased, and the increase fully paid in.

3rd. False and fraudulent representations of the officers of said bank as to its financial conditions, its surplus and dividends, and as to the increased capital stock, having been subscribed for and fully paid in, by which defendant was induced to subscribe for his stock.

4th. That when said increase was made, said bank was insolvent and its capital stock lost.

5th. That only about two-thirds of said increased stock had ever been paid in.

6th. That the officers of said bank made false entries in its books, showing an apparent surplus from which to

declare a dividend, and then turned in said dividend in pretended payment for a large part of said increased stock.

7th. That the books of said bank were falsified, so that defendant could not, by diligence, ascertain the true condition of said bank, and that as soon as he did discover it, he disavowed being a stockholder.

8th. That defendant did not ascertain the true condition of said bank, until after it failed, and that as soon as he discovered that said increase had not been fully paid in, denied that he had ever been a stockholder.

FROM THE FOREGOING STATEMENT IT WILL BE SEEN,

1st. That the answer DOES NOT ALLEGE that the whole of the $150,000 increase of capital stock had not been in good faith SUBSCRIBED, but only that it HAD NOT BEEN FULLY PAID FOR.

2nd. That this failure to pay, was not the result of any refusal of any of the subscribers to this increased stock to pay, but because a part of the subscribers paid a part of their subscription, in dividends, which had been declared by the bank in their favor, and which dividends it is now alleged, four years after they were declared, were not in reality due them, and hence their stock was not *fully paid for.*

3rd. That the answer does not offer to rescind the alleged "contract" of subscription, nor does it offer to return the dividends received, aggregating 18 per cent of the par value of the stock, nor to account for it.

IT WILL ALSO BE NOTICED that whilst he alleges that he *could not* have ascertained that the bank books had been falsified by the "*utmost diligence,*" yet he does not allege that he exercised any diligence whatever, or that he made any inquiries, whatever, or that he even attempted to learn the true state of the accounts of said bank *before* he subscribed

for his stock, nor *afterwards before the bank failed*, nor does he state any facts showing why he was so easily and quickly able to ascertain their falsified condition so soon *after* the bank failed, when, by the "utmost diligence he could not ascertain the true state of the bank," *for nearly four years before it failed.*

The averment that he could not, by the utmost diligence, ascertain the true state of the bank is a mere conclusion, and is not tantamount to an averment that he exercised diligence.

Decision in U. S. Circuit Court.

It is true, that in the United States Circuit Court for the Central Division of the Western district, of Missouri, no opinion was written or filed in this particular case, but there were a large number of cases, all involving the same questions, consolidated, and the opinion was written and filed in the case of *Latimer* vs. *Bard*, in which a demurrer was filed to the answer, instead of a motion for judgment upon the pleadings.

The opinion of Adams, Judge, in that case, reads as follows:

(See 76 Fed. Rep. p. 536.)

Opinion in U. S. Circuit Court.

"The several cases consolidated into this action are brought by the plaintiff as receiver of the First National Bank of Sedalia, against divers persons, stockholders of said bank, to recover the amount of an assessment made by the Comptroller of the Currency of 75 per cent. of the stock held by them respectively. The defendants file a joint answer, setting forth in effect that the stock held by them upon which such assessment was made is part of a

pretended increase of stock, that such increase was invalid and unlawful, for the reason, as alleged, that the whole amount of such increase was not paid in. It appears by the answer, that the original capital of the bank was $100,000: that on September 6, 1890, the shareholders by a vote of the owners of two-thirds thereof, resolved to increase the capital in the sum of $150,000, so as to make it $250,000, instead of $100,000, as theretofore; that subsequently certificates for the increase were issued to the subscribers therefor; that thereafter on January 17, 1891, the Comptroller of the Currency of the United States duly certified that said bank had increased its capital in the sum of $150,000, with his approval thereof, and further certified that the whole amount of such increase had been paid in. It further appears that the defendants received the certificates representing the stock subscribed and paid for by them prior to October 25, 1890; that during the years 1891 and 1892 the defendants, as such stockholders, received dividends on their stock amounting in the aggregate to 18 per cent. theroof; that, notwithstanding the apparent conformity with all the provisions of the acts of Congress, relating to the increase of stock, in point of fact, at least one-third of the amount of such increased stock was subscribed for by the officers of the bank, who subsequently issued certificates to themselves therefor, without paying anything for the same; that this was accomplished in the following way and manner, as stated in the answer as amended, that is to say:

'By fictitious and false entries entered in the bank books and records they made a showing of an apparent surplus in the bank's assets for division among themselves as holders of the original capital stock, and went through the form of declaring a dividend therefrom to themselves, and returning the same to the bank as an alleged payment for their shares of the increased

stock, whereas no money passed, the whole transaction was a mere sham, there was no surplus (the bank being then insolvent),—and all of which was done with the fraudulent purpose on the part of said officers of appropriating to themselves a part of the increased stock without any payment thereof. All of which was done without the knowledge or consent of any of the defendants, none of them having any knowledge thereof until after the making of the assessment sued on.'

It is further alleged in the answer that no profits were made by the bank after the defendants subscribed for the increased stock, and that the dividends which they received as stated, were paid to them out of the capital which they had paid in; that the officers of the bank falsely and fraudulently represented to the defendants, at the time of taking their subscriptions and receiving their money, that the bank was solvent, that the increase had been lawfully made, and that the same had been fully paid in, that these statements were false, and known to be false by the officers of the bank when making them; that the defendants made their subscriptions and paid in the amount thereof and took their certificates in implicit reliance upon such statements; that the defendants had no knowledge of the falsity thereof, or of the false entries made as aforesaid, or of the alleged illegality of the increase of stock, until after the Comptroller of the Currency made the assessment against the stockholders on April 13, 1895, and by the exercise of ordinary care could not have discovered or known the truth; that immediately on discovering the facts, after the assessment was made against them, they tendered to the plaintiff the amount received by them as dividends as aforesaid, and offered to deliver up their stock to him, also. To this answer a demurrer is interposed. The defendants' counsel do not rely upon the false representations as such of the officers of the bank, as a defense, but, in argument, contend solely that the increase of capital was void because the whole

amount of such increase was not in good faith paid in, and that defendants are entitled to invoke such fact as a defense to this action against them.

The only question for consideration, therefore, is whether or not the alleged fraudulent action of the officers of the bank in figuring out an apparent surplus entitling them as holders of the original stock to a dividend, and appropriating the same to themselves and using it in paying up their quota of the increased stock, rendered invalid and void the entire increase. The national banking law (section 5142, Revised Statutes, 1878), and the amendment of May 1, 1886, (24 Stat. 18). provide, in effect, that three facts must concur to constitute a valid increase of the capital stock of a national banking association: First, a vote of shareholders owning at least two-thirds of the original capital; second, the whole amount of the increase must be paid in; third, the Comptroller of the Currency, by his certificate specifying the amount of increase of such capital, must approve thereof, and certify to the fact of its payment. The pleadings in this case show the requisite vote of shareholders and the requisite certificate of the Comptroller. The case shows by fair inference from the facts pleaded and law necessarily applicable thereto, that the bank, by and through its proper officers, advised the Comptroller, among other things that the increased capital had been duly paid in. Acting upon this advice, and such other information as to him seemed requisite, the Comptroller approved the increase, and made the necessary certificate that the amount of the increase had been duly paid in as part of the capital of the banking association.

1. If there was nothing else in this case, I would hold that the action of the Comptroller, as last stated, is conclusive of the question of fact certified by him, and that the

defendants are not at liberty, in this collateral proceeding, to open the same. The comptroller occupied a position quasi judicial in its character. His finding and certification of the fact now in question was an exercise of the judicial function, and ought not to be disturbed except upon some appropriate direct proceeding to that end. In the case of Casey v. Galli, 94 U. S., 673, the receiver of a national banking association sought to recover from a stockholder the amount of an assessment duly made by the Comptroller. The stockholder, among other defenses, set up the fact that the banking association was created under the provisions of the national banking law permitting a state bank to be converted into a national bank, and that two-thirds of the capital stock never authorized the conversion and never accepted the organization certificate, as required by the act of Congress, as conditions precedent to such conversion. Section 18 of the act provides that when the Comptroller shall give to such association a certificate under his hand and official seal that the provisions of the act have been complied with, and that it is authorized to commence the business of banking under it, the association shall be deemed to be a national banking association, the same as if originally organized under the act. The Supreme Court, in passing on the case, says:

'The plea denies the irregularity of the proceedings in the single particular that the owners of two-thirds of the capital stock of the bank did not authorize the directors of said bank to convert it into a national banking association nor to accept an organization certificate as such banking association.'

After alluding then to the admission contained in the pleadings that the Comptroller's certificate was duly made, the Court says:

'The plea proposed to go behind the certificate and contradict it. This cannot be done. The Comptroller was clothed with the jurisdiction to

decide as to the completeness of the organization, and his certificate is conclusive upon the subject for all purposes of this litigation. It has the same effect, and for the same reason, as his determination and order with respect to the amount to be collected from such stockholders in the event of the failure of the association. No question can be raised in this collateral way as to either. In Thatcher v. Bank, 19 Mich., 196, it is held 'that whether there was any defect in the process of organization was a question for the Comptroller to decide, and that his certificate of compliance with the requirements of the act of Congress removes any objection which might otherwise have been made to the evidence upon which he acted.' In this we concur.'

The case of Smelting Co. v. Kemp, 104 U. S. 636, is a leading case on the conclusiveness of the findings of executive officers of the government upon matters referable by the law to them. In the opinion in the last mentioned case it is said:

'In that respect they [officers of one of the executive departments] exercise a judicial function, and therefore it has been held in various instances by this Court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or amendment.'

To the same effect, also, are the cases of Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030, and U. S. v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948.

Applying the principles of the foregoing cases, it seems to me clear that the action of the Comptroller of the Currency in certifying that the whole amount of the increase of stock had been paid in, with his approval of the increase, so partakes of the judicial character that it cannot be assailed in this proceeding. In reaching this conclusion it must be borne in mind that the particular matter which, by the answer, is relied upon as a defense, is, by the act of Congress, pointedly referred to the Comptroller for his

finding and certification. If, therefore, the finding of any executive officer of the government, in any case, is to be treated as conclusive (except as against direct attack), it seems to me his finding and certificate of this fact ought to be. The important and diverse business interests of a bank, and the welfare of its stockholders and creditors, demand, in my opinion, that a matter of fact so affecting each and all of these features as the stockholders' relations to the bank, and their liability to its creditors, should be fixed, clearly and definitely, by some decisive authority, and this is what I think Congress undertook to do in requiring the Comptroller of the Currency to find and certify to the fact in question, and as a result thereof to give his approval to the increase. The foregoing is decisive of the demurrer in this case, but as other important and grave questions have been argued by counsel I will briefly advert to them.

2. The pleadings, as already seen, show that the defendants received their certificates of stock and became ostensible shareholders prior to October 25, 1890. From and after that date, at the latest, the bank was held out to the world as possessing a capital of $250,000, and these defendants allowed themselves to be held out as shareholders of the bank, and, under the law, as liable to creditors to the extent of the amount of stock held by them. It is a matter of common knowledge, and goes without saying, that the double liability of shareholders in national banks is relied upon by creditors as security for their debts. Relying upon this security, depositors trusted the bank, and it became indebted to divers persons in such large amounts that at least 75 per cent. of the capital stock (besides all the other assets of the bank) is required to pay them. The ostensible relation of the defendants to the bank and its

creditors was, for five years, that of shareholders. By their conduct they influenced persons to their injury. They ought, therefore, unless some controlling principle of law is violated, to be held to the liability to which they have apparently been subject. But it is said that they are not bound because they did not know the facts relied upon now as a defense until the failure of the bank, and after the assessment was made by the Comptroller against them, and because they could not, by reason of the fraudulent conduct of the officers of the bank, by the exercise of ordinary care, have ascertained such facts sooner. I do not think they can be heard to excuse themselves in this way. They ought to have been more diligent in ascertaining and knowing the facts. They had enjoyed all the privileges of stockholders in corporations of this state, including the full right of personal examination and inspection of books, papers, and documents. They admit that they did, in fact, discover the truth after they were called upon to respond to their apparent liability. This admission shows that the discovery was not only possible, but that when their financial interests required attention they were able to discover the facts of the case. In my opinion they ought to have seriously considered this subject when the financial interests of the bank's creditors required attention.

In the case of Upton v. Tribilcock, 91 U. S. 45, it is said:

'The principle laid down in the charge of the Judge, that one who claims to have been drawn into a fraudulent purchase must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud, is a sound one. * * * A party must use reasonable diligence to ascertain the facts. * * * Parties who are shareholders, and claim to be relieved on the ground of fraud, must act with the utmost diligence and promptitude.'

Applying the foregoing principles to the facts before

the Court in that case, the Supreme Court held as follows:

'To subscribe for stock in a corporation in August, 1870, to rest quietly until the year 1873, never making any investigation as to the position in which he stood until that time, and until after the assignee in bankruptcy had made a demand upon him, falls very short of what the law requires. * * * It was his plain duty to have inquired and to have ascertained his position long before he did.'

To the same effect is the case of Sanger v. Upton, 91 U. S. 64, where it is said:

'She [the shareholder] was estopped from denying her ownership; she could not assert her title if there were a profit and deny it if there were a loss.'

No more can these defendants be allowed to deny their ownership of the stock in question after having taken their certificates, asserted their ownership, and received dividends, in times of prosperity. They allowed five years to elapse, and during this period received profits from the conduct of the business of the bank, permitted debts to be contracted on the strength of their apparent liability under the law for their payment, and their only answer now is that they could not have discovered the alleged fraud by the exercise of 'ordinary care.' Greater care and diligence than this was required of them. They are therefore estopped by their own laches from denying the liability now asserted against them.

3. Again, the officers of the bank, in taking the necessary steps for increasing its stock, acted as the agents and trustees of the parties interested in such increase. Their acts are the acts of their principals, and while they may be held to individual liability to their cestuis que trustent for breaches of their trust, neither they nor their principals ought to be heard to assert their own wrong to defeat the claims of innocent third parties who acquired rights upon the faith of what was apparently done. Under such cir-

cumstances the equities of creditors are greater than those of defrauded principals even, and to permit such principals now to deny their liability would defeat the ends of justice and work a legal wrong. Ogilvie v. Insurance Co., 22 How, 380; Railway Co., v. McCarthy, 96 U. S. 258; Bank v. Hawkins, 18 C. C. A. 78, 71 Fed. 371; Duffield v. Iron Works, 64 Mich. 292, 31 N. W. 310.

4. It is further argued by defendants' counsel that the entire increase of stock in question was ab initio void, and hence that no question of estoppel can arise against the defendants in this case. They say it was ultra vires and void because one of the essential and statutory requirements was not complied with, namely, 'the whole amount of the increase was not paid in.' They contend that the paying in of the whole amount of the increase was a fundamental prerequisite to a lawful and valid increase, and that the failure so to have done, as pleaded by defendants, renders the increase absolutely void. This argument proceeds entirely upon the alleged want of power in the bank. Notwithstanding the views already expressed concerning the conclusiveness of the Comptroller's certificate, I will briefly consider this view of the case.

Counsel rely mainly on the cases of Winters v. Armstrong, 37 Fed. 508, and Delano v. Butler, 118 U. S. 634, 7 Sup. Ct. 44, in the last of which the Supreme Court says:

'It appears that three things must concur to constitute a valid increase of the capital stock of a national banking association: First, that the association, in the mode pointed out in its articles and not in excess of the maximum provided for by them, shall assent to an increased amount; second, that the whole amount of the proposed increase shall be paid in as a part of the capital of such association; and, third, that the Comptroller of the Currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof and certify to the fact of its payment.'

This language was used prior to the amended act of May 1, 1886, and would necessarily be somewhat modified now, if treating of the same subject under the provisions of the amended act, but for all the purposes of the argument in question this circumstance is immaterial. The argument is that these three several requirements are expressions of limitations upon the fundamental power conferred upon the bank to increase stock, and that the failure to comply with either of these requirements, in an attempted increase, renders the consummation void for want of fundamental authority therefor. It must be conceded at the outset that if the sovereign authority never conferred power upon the bank to increase its stock at all there was no valid increase in this case, no valid subscriptions by the defendants to such increase, and no liability on their part by reason of any certificates therefor which they may have received; and in such case no acquiescence, laches or estoppel on the part of the defendants, as subscribers to such stock, can work any liability against them. Scoville v. Thayer, 105 U. S. 143; Implement Co. v. Stevenson, 13 C. C. A. 661, 66 Fed. 633. Inquiry must therefore be first made as to whether the requirement that the whole amount of the increase must be paid in relates to the abstract power to increase, or to the performance of that power.

Section 5142, Revised Statutes, 1878, provides as follows:

'Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of the

capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.'

This section was amended by the act of May 1, 1886, (24 Stat. 18). The first section of this amended act reads as follows:

'That any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by said Comptroller, notwithstanding the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided.'

In considering the question of 'abstract power,' it is well at the outset to clearly understand what is meant by the expression. It is said in the case of Bank v. Hawkins, 18 C. C. A. 80, 71 Fed. 370:

'An act is ultra vires a corporation when it is beyond and outside of the scope of the powers conferred by its founders, when the corporation is without authority to perform it under any circumstances or for any purpose.'

In other cases it is held, and it is generally so understood, that, if any way is provided by law for accomplishing a desired purpose, power in the abstract may be said to exist for doing it.

The statutory provisions above quoted undoubtedly provide some way for increasing the capital stock of a national banking association and certainly authorize the increase under certain circumstances and subject to certain requirements. They therefore provide 'abstract power,' as already defined, for doing the act. The steps to be taken in effecting the increase are enumerated in the acts, but these, with the exception of the approval of the Comptroller of the Currency, do not in my opinion concern the question of abstract power to do the act, but relate exclusively to

the method of performance or the exercise of the power granted. Scoville v. Thayer, *supra*, was an action to recover an unpaid balance due on subscription to increase stock. According to the laws of Kansas, where the corporation there under consideration was organized, any corporation might increase its stock to any amount not exceeding double its authorized capital. After exhausting this power in making one increase which fully doubled its authorized capital, the corporation attempted, by taking the steps required by law for the lawful increase of stock, to further increase its capital. The Supreme Court held that this attempted second increase presented a clear case of want of power in the abstract, which no acquiescence laches, or estoppel could cure.

Implement Co. v. Stevenson, *supra*, presents another instance of total want of power to make the increase. An attempt was made here to increase stock of a corporation to an amount in excess of the statutory limit, and the Circuit Court of Appeals followed the doctrine of Scoville v. Thayer, but in the opinion drew a sharp distinction between that case and others, involving a defective or informal exercise of the power granted, holding that in the latter case a stockholder may estop himself from denying the validity of the stock or his liability therefor.

Veeder v. Mudgett, 95 N. Y. 295, is a case in which the Court of Appeals of New York, says: 'The abstract power [to increase the stock] did exist, and there was a way in which the increase could lawfully be made, and the creditors could without fault believe that the increase had been lawfully effected, and the necessary steps had been taken,'—and holds, notwithstanding failure to comply with certain requirements of the statute relating to increase of capital stock, that the stockholders, by voting for such

increase, accepting their proportion of it, and dividends upon it, and by holding it out as a component part of the capital, are estopped from denying the legality of the increase.

In Chubb v. Upton, 95 U. S. 665, it appears that the holders of the original capital stock never authorized the increase, and other such irregularities occurred as, between the stockholders and the company, might have subjected the increase to annulment by a direct proceeding; yet the Court says:

'All this does not alter the fact that there was an attempted alteration of the company, under the form of law, approved by the attorney-general, with an increased capital, in the organization and management of which the defendant took part; that he paid his money, received his certificate of stock, attended meetings, voted, acted as an officer, and, so far as the record shows, never repudiated his position at any time, even to the time of the trial. If successful, he would have shared in its profits. He may have been the dupe and victim of the actions of others; he may have been an a complice; at all events he was so far an actor in the affair that he cannot escape the consequences of his position.'

As a result of a careful examination of all the cases bearing on this question, I am constrained to hold that the statutes of the United States confer the abstract power upon national banking associations to increase their capital to such a limit as might be approved by the Comptroller of the Currency, and that this power, as such, exists independently of the separate steps required to be taken by the shareholders in the exercise of the power, and that any irregularities, informalities, or defects in the exercise of the general power, like that set up as a defense to this action, may be waived by the subscriber; and that the defendants in this case, by their laches and conduct, have so waived it, and are estopped from availing themselves of the irregular-

ity complained of by them. The demurrer must be sustained."

In the Circuit Court many points were raised and discussed, but in this Court, the plaintiff in error raises but two, to-wit:

1st. That there was no valid increase of capital stock made, because the whole amount of the proposed increase *was not paid in.*

2nd. That plaintiff in error is entitled to a recision of his subscription contract.

Brief and Argument.

I.

The certificate of the Comptroller, approving the increase of capital stock and certifying that it had been fully paid in, is conclusive, and the validity of the increase cannot be assailed in a collateral proceeding like this.

Latimer vs. Bard, 76 Fed. Rep. 536, and cases cited.

Bailey vs. Sellinghost, 99 Fed. 801.

To the same effect, or, involving the same principle, see—

Sheafe vs. Larimer, 79, Fed. Rep. 921.

This is so held with reference to the Comptroller's action, in making an assessment against stockholders.

Kennedy vs. Gibson, 8 Wall, 498.

Casey vs. Galli, 94 U. S. 673.

Nat. Bank vs. Case, 99 U. S. 628.

And with reference to his action in certifying that a banking association is duly organized, and entitled to commence business;—

Casey vs. Galli, supra.

Latimer vs. Bard, 76 Fed., 536 on 539.

If these cases be correctly decided, the principle therein established cuts off all further discussion of this case.

But we propose to go a step further. and show that even if this case was not dominated by this principle, yet the new matter set up in the answer does not constitute a defense to this action.

II.

The first defense is, that when the Comptroller issued his certificate, certifying that all of said increased stock had been paid in, as required by Sec. 5142, Revised Statutes, U. S., 1878, that only about two-thirds of it had in fact been paid in, and that for this reason the increased stock was invalid, and Scott being entitled to a recision of the contract of subscription, is not liable for this assessment.

Counsel for defendant in error, might well be content with referring this Court, upon this point, to the able opinion of the United States Circuit Court of Appeals, rendered in this case, and printed in the transcript of the record, pages 19 to 32 inclusive.

It would scarcely be possible to *refute* the doctrine contended for by plaintiff in error, in more clear or stronger language than is used by JUDGE SHIRAS in that opinion.

And we beg leave to call this Court's attention to the fact that Judge Shiras' opinion *supra*, was evidently written under the impression that *no sort of payment whatever* was ever made for about one-third of the increased stock, whereas the answer shows that it was *paid for in full*, but that a part of it was paid for in dividends declared from a *surplus*, which plaintiff in error *now says, did not exist.*

The bank declared these dividends. It accepted them in part payment for the increased stock, and it certified to the Comptroller that the whole amount of such increased

stock had been paid for in full. How can the plaintiff in error, in this collateral action, be permitted to go back to a time *four years* before the bank failed, and about *six years* before this action was brought, and inquire into the fact as to whether such surplus did exist, and upon the determination of that fact, assert that the stock was or was not paid for?

We beg leave, however, to suggest that this exact point, decided by Judge Shiras, was long before considered, and decided adversely to the contention of plaintiff in error, in each of the following cases, to-wit:

Latimer vs. Bard, 76 Fed. Rep., 536.
Winters vs. Armstrong, 37 Fed., 503.
Vedder vs. Mudgett, 95 N. Y., 295.
Stutz vs. Handley, 41 Fed. Rep., 531.
Aspinwall vs. Butler, 133 U. S., 234.
Butler vs. Eaton, 141 U. S. 240.

The objection to the argument of the learned counsel for defendant is the effect they give to the statute. The amended act quoted and which governs the increase of capital stock in national banking associations, clearly confers the power upon such associations to increase their capital. It says: "That any banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase the capital stock in accordance with existing laws."

Here is clearly given the *power* to make the increase, subject only to the approval of the Comptroller. The manner of making the increase is provided, that is by a vote of shareholders owning two-thirds of the stock.

But the same section further provides that no such

increase "shall be made except in the manner herein provided." We agree with the counsel for defendant that this amendment does not repeal the other requirements of the original act and that that part of the original section, to-wit:

"And no increase of the capital shall be valid until the whole amount of such increase is paid in," should be held as part of the act in force.

The question is what effect has this clause in cases where the banking association has in all respects complied with the requirements of the statute except to pay in the increased capital, and the owners of such stock have accepted it, voted it and accepted dividends thereunder.

The intention of the legislature must always be sought after in deciding upon the legal effect of words contained in a law or charter, and unless it appears affirmatively that the legislature intended to render a forbidden act absolutely void in legal contemplation, it will not be so held.

To adopt the construction contended for by the defendant, is in effect to declare that under this statute, although subscribers may receive their stock, and derive from it all the resultant benefits for years, yet when the burdens which accompany the ownership fall upon them, they may repudiate their contract, pleading as a defense thereto their own wrong.

The Courts do not so hold and the cases cited by counsel for the defendant do not support his contention. The expression of the Court in the case of Delano vs. Butler, *supra*, relied upon, is not construed in the subsequent cases as counsel for defendants contends, as a review of them will disclose.

The case of Winters vs. Armstrong, 37 Fed. Rep. 508, arising out of the failure of the Fidelity National Bank of

Cincinnati, was a case in which none of the requisite steps were taken to increase the capital stock and in the discussion of the liability of the subscriber in that case, Mr. Justice Jackson considers the very question raised in this case. On page 518 the learned judge quotes from the case of Scoville vs. Thayer, showing that in that case the corporation had authority by law by its own act to increase its capital stock to a certain limit, but when it passed that limit the increase was in excess of its prescribed authority and was wholly wanting in legal validity and hence no act of the corporation, or acquiescence of the subscriber could operate to give the subscription validity or estop the shareholder, even in favor of creditors. Then the Court continues:—

"National bank associations have no authority of law by their own action to increase their capital stock to any amount whatever. They can make no increase to any extent without the approval of the Comptroller as the representative of the government. His approval confers the right to make and fixes the limit or the amount of such increase. Within its own power and by its own action a national bank can make no increase of its capital stock. It might, and would doubtless be, true that with or after the Comptroller's approval of an increase, which involves the exercise of discretion, supervisory on his part, and wholly beyond the control and independent of the action or wish of the association or of its stockholders, the steps taken or mode of procedure adopted by the bank might not strictly conform to the requirements of the law; that for want of such conformity the action on the part of the association might be illegal; and that the *stockholders or subscribers for such stock*, who had accepted an alotment of shares thereunder, and acquiesced in the steps taken and the proceed-

ings had by the association in the preliminaries to be performed on its part, *would be bound.* In effecting an increase of its capital stock the association may, so far as relates to its own action, proceed in an irregular or informal manner, which a stockholder *who has acquiesced therein may not, as against either the corporation or its creditors, take advantage of or insist upon as invalidating his subscription, or the stock issued to him thereunder.* But in regard to the sovereign's consent to increase, to be expressed in and by the approval of its Comptroller of the Currency, that is an essential prerequisite or condition precedent, like a special enabling act, in conferring the power and authority to make the proposed increase valid. Such approval involves the grant of power to complete and perfect the proceedings commenced by the association looking to an increase of its capital stock. It is something lying beyond the action or control of the association and its stockholders seeking to effect an organic and fundamental change in the constitution of the bank; and in respect to this essential thing, in nowise involved in the action or steps taken by the association, the question of irregularity or informality in its own mode of procedure, and the consequences thence resulting, do not apply."

Continuing on page 519, the Court takes up the case of Vedder vs. Mudgett, 95 N. Y., 295, and distinguishes between it and the case of Scoville vs. Thayer and approving the doctrine declared in the New York case, says:

"In Vedder vs. Mudgett, as the Court asserts, and as the statute shows, 'the abstract power did exist' on the part of the corporation to make the increase of its capital stock, and there was a way in which the increase could lawfully be made by the corporation's own action, independent of the sanction or approval of any state officials. The New

York statute under which the corporation acted was substantially like that of the Illinois statute under which the Upton cases, above referred to, arose, and which the Supreme Court held, conferred upon the corporation the power to make the increase of its stock, in the execution of which the irregularities and informalities occurred which were held, not to invalidate the stock. In the Vedder case, as in the Upton cases, there was color of compliance with the statutory requirements, which came within the power and legitimate action of the corporation. The want of conformity to the provisions of the law, relied on as rendering the stock void, were defects committed entirely by the corporation in respect to matters within its own control, and as to which it was invested with full authority."

Counsel for defendant in error, cannot find any case in which the question at bar is so well argued and presented as in this case from which we have quoted so largely, and we understand from the reasoning of the learned judge, that a failure on the part of the banking association to do those things which it had power to do under the act of Congress, and which was committed to it to do, to enable it to increase its capital stock, if it does also procure the necessary certificate from the Comptroller, does not relieve its shareholders who have taken part of the increased capital and received the full benefits of it, from having the doctrine of estoppel plead in its full force against them.

In the latter case, Stutz vs. Handley, 41 Fed. Rep. 531, the same learned judge fully discusses the difference betwen a lack of power on the part of the corporation and the mere non-performance of acts devolving upon itself or within its own control.

After quoting from the opinion of the Court in Scoville

vs. Thayer, Associate Justice Jackson on page 541 of case cited, says:

"The reason for the distinction thus indicated is founded upon the principle that a corporation has no inherent authority of its own motion, or by its own action, to effect fundamental changes in its constitution or organic law, such as an increase of its capital stock involves. It is an essential prerequisite or condition precedent to the validity of such a change that the sovereign by whom the corporation is created, or under whose law it is organized, shall give its consent thereto, either in the company's charter, or by some general or special act. But, when such authority is conferred, those who accept stock under the exercise of the power by the corporation are not allowed to *shield themselves from liability in respect thereto by setting up the failure on the part of the company or of themselves to perform any subsequent act or duty resting within its or their control, such as making, recording, or publishing a certificate of such corporate action.* This Court had occasion to consider and apply this distinction between lack of power on the part of the corporation and the mere non-performance of acts devolving upon itself or within its own control, in the case of Winters vs. Armstrong, 37 Fed. Rep., 508-520, where the subscribers for increased capital stock were relieved because the corporation failed and ceased to exist before it had acquired the requisite power to make the increase."

In the case of McFarland vs. First National Bank, 68 Fed. Rep. 868, the banking corporation never secured authority from the Comptroller of the Currency to increase its capital stock, and of course the final certificate declaring the increase and authorizing it to do business was never issued, and the Court simply held that although the shareholders had taken the preliminary steps to increase the

capital, yet the action of the Comptroller in refusing to issue a certificate prevented the increase from ever being made effective, or binding upon the subscribers.

It is no authority for the proposition contended for by the defendants.

Laredo Implement Co. vs. Stevenson, 66 Fed. Rep. 633, the United States Circuit Court of Appeals, held that the defendant, a subscriber to the capital stock of a corporation was not estopped to deny its validity by the fact that he had voted the stock when the corporation was absolutely without power to increase the stock, and in such case no act or consent of the shareholder who received such stock estopped him from denying its validity.

The want of power which will make the act of the corporation void so that no rights can be based upon them is very clearly defined in Citizens National Bank vs. Hawkins, 71 Fed. Rep. 370. The Court says:

"An act is *ultra vires* a corporation when it is beyond and outside of the scope of the powers conferred by its founders, when the corporation is without authority to perform it under any circumstances or for any purpose. Such acts are void and no contract for their performance can be enforced by or against the corporation, the plea of *ultra vires* being available to either party to the contract. There are, however, acts done in excess of conferred powers, illegal as to stockholders, but for which the corporation is liable to innocent third party. * * * In the case at hand no power is granted to purchase stock in another bank and therefore a prohibition to do so may be implied."

The Court continuing says, however, that the bank had a right to loan money on the shares of stock in another bank, and acquire the stock by a sale thereof under execu-

tion and that it therefore had a right under certain circumstances to acquire stock in a national bank, but it acquired the stock in question by purchase from a third party and had it transferred to itself. The acquisition was without the general scope of its powers.

"The case is, therefore, one of an abuse of a general power, a wrongful exercise of conferred power, for purposes and under circumstances contrary to law, and not in the exercise of a power not in any event given. It is therefore, related to the second class above noted to which the doctrine of *ultra vires* does not apply. In all such cases a corporation cannot set up its own violation of law to escape the responsibility resulting from its illegal act."

In Central Transportation Co. vs. Pullman Palace Car Co., 139 U. S., 24, where the same principle is discussed, it is held:

"A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside of the object of the creation as defined in the law of organization, and therefore, beyond the powers conferred upon it by the Legislature is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as the persons contracting with it may be estopped to deny that it has complied with the legal formalities *which are prerequisites to its existence, or to its*

action, because such requisites might in fact have been complied with."

In deciding the case of Vedder vs. Mudgett, 95 N. Y., 295, which has been referred to in the other cases cited, the Court on page 310, says:

"But no notice of such meeting of stockolders was given, as required by section 21, chapter 40, of the acts of 1848, nor was any certificate of the proceedings of such meeting made, or filed, as required by section 22 of the same act. The attempted increase was, therefore, illegal, but the respondent insists that, nevertheless, as against the creditors of the company, the defendant stockholders by accepting their proportions of the increased stock, by voting for its increase, by taking dividends upon it, and holding it out to those dealing with the company as an actual component of its capital, are estopped from denying the legal validity of the increase and must be held responsible as if it were valid. The authorities for this doctrine are numerous and strong. (Eaton vs. Aspinwall, 19 N. Y. 119; Chubb vs. Upton, 5 Otto. 665; Aspinwall vs. Sacchi, 57 N. Y. 331; B. & A. R. Co. vs. Cary, 26 id. 75; Kent vs. Quicksilver M. Co., 78th id. 159; Sheldon H. B. Co. vs. Eickemeyer Co., 90 id. 613.) The answer made to them is that an act absolutely and wholly void, because, under the law, incapable of being performed, cannot be valid by estoppel. This is true where under the law there is an entire lack of power to do the act which is brought in question. The distinction is well illustrated in Scoville vs. Thayer (105 U. S. 143). Under the law of Kansas no company like that then before the Court could increase its capital to more than double an amount originally authorized. The capital was sought to be increased in excess of that amount. As against creditors it was claimed to be a valid

increase by the operation of an estoppel, but the Court ruled otherwise, and justly; for the very foundation of estoppel, the misleading of creditors to their injury was wanting. The latter knew and were bound to know that no power existed to so increase the capital, and that, therefore, it was not increased; and hence they were not, and could not be misled. But whereas, in the present case, the power did exist, and there was a way in which the increase had been lawfully effected and the necessary steps had been taken, there the doctrine of estoppel may apply, and the increased stock be deemed valid as against the creditors who have acted upon the faith of such iscrease. The referee has found that each and every one of the present defendants have done some act which brings them within the range of the estoppel alleged, or hold shares of the stock which in the hands of the assignors stood charged and burdened with a liability for the company's debts. We must, therefore, treat the increase as lawful, and precisely as if the needed preliminary steps had in truth been taken."

The cases referred to—

Upton vs. Tribblecock, 91 U. S. 45, and

Chubb vs. Upton, 95 U. S. 665.

Webster vs. Upton, 95 U. S. 65.

Sanger vs. Upton, 95, U. S. 56.

All arose out of subscriptions to the capital stock of the Great Western Insurance Company, an Illinois corporation, are directly in point in the case at bar. The particular wording of the statute does not clearly appear from the decisions, but enough is apparent to show that no valid increase could be made under the statute except in compliance with its provisions.

The statement of the case in Chubb vs. Upton, 95 U. S. 665, is:

"In 1870, acting under the general laws of that state, (Illinois) authorizing insurance companies to increase their capital stock, the directors and shareholders of the company took measures to increase the capital stock and filed their papers for that purpose with the secretary of state and auditor of public accounts. By these proceedings the company undertook to increase its stock to $5,000,000. The company assuming that the stock had been increased, took subscriptions and issued certificates therefor and immediately commenced doing business, etc. (Page 665.)

Chubb subscribed for some of the stock and voted it at stockholders' meeting. When sued upon it for the unpaid part of his subscriptions, he offered to show in his defense certain alleged irregularities and informalities in the papers filed in public offices and to show that the holders of the stock in the original company never increased their stock or authorized anyone to increase it. (Page 666.) In the statement of the facts in this case as reported in the Lawyer's Co-operative Publishing Co., edition of these reports, book 24, page 523, it appears that the defendant offered to show that the original of the paper documents introduced on the part of the plaintiff, relative to increasing the stock of the company, were forged, etc."

All of this evidence was rejected. In passing on the questions presented, the Court, among other things, says:

"It is idle to deny that this was the case of an organization which claimed to have been taken and apparently supposed that it had taken, the measures required by law to complete the increase of capital. It acted as such and the defendant, by receiving his certificate of stock, entered into engagements with it as such. If it be conceded that

the increased stock was but *de facto* and that it could have been annulled or suppressed by the action of the attorney-general as acting under an irregular organi. zation, the defendant derives no aid from the admission. The cases cited are clear to the point that he cannot make the objections, but must perform the engagement he has made."

Then addressing itself to the more important question, that is, the offer to show that the holders of the stock never increased the capital nor athorized its increase, the Court says (Page 669):

"All this does not alter the fact that there was an attempted alteration of the company under the forms of law, approved by the attorney-general, with an increased capital, in the organization and management of which the defendant took part, that he paid his money, secured his certificate, of stock, attended meetings, voted, acted as an officer, and, so far as the records show, never repudiated his position at any time, even to the time of the trial. If successful, he would have shared in its profits. He may have been the dupe and victim of the action of others. He may have been an accomplice. At all events he was so far an actor in the affair that he cannot escape the consequences of his position."

This line of cases seem to us to fully answer the position taken by the counsel for plaintiff in error. They clearly hold that although the increase may not be valid, and could be successfully questioned by the shareholders at the proper time, or by the state by quo warranto, or other proceeding, yet the power is conferred to increase the stock in a certain way in certain event, and although it may not have been paid in, yet the defendant is estopped to show that fact by his action and he must stand by his engagement.

The cases growing out of the failure of the Pacific National Bank of Boston are fully in accord with the foregoing. That bank proposed to increase its capital stock $500,000 and the preliminary steps were taken, but when it was finished it was found that only $461,300 of stock had been subscribed and paid in. The directors had adopted a resolution to make the increase $500,000. The stockholders had a regular meeting called for the purpose, had voted to increase the capital stock $500,000, but subscriptions only to the amount of $461,300 were secured. Thereupon the board of directors certified that fact to the Comptroller and the Comptroller issued his certificate for an increase in the latter amount. Afterwards the bank failed and the subscribers to this increased stock were assessed 100 per cent. on the shares.

These cases are:

Delano vs. Butler, 118 U. S. 649.

Aspinwall vs. Butler, 133 U. S. 595.

Pacific National Bank vs. Eaton, 141 U. S. 227.

Butler vs. Eaton, 141 U. S. 240.

Thayer vs. Butler, 141, 234.

The liability upon the assessment made upon the increased shares seems to be put upon the ground that the matter about which objection was made was one wholly within the discretionary power of the corporation, subject to the approval of the Comptroller. Besides this the Court says it was not open to the subscriber to say what he did in receiving his shares was in ignorance of the facts, because opportunity and means of knowledge were such as by the exercise of common diligence he would have become acquainted with them and his course of action must be construed to constitute a complete acquiescence in and ratifica-

tion of, the previous action of the association and Comptroller of the Currency.

Delano vs. Butler, 118 U. S., 652.

They also fully answer the objection that the certificates for shares of the increased stock were issued before the Comptroller issued his certificate. In Pacific National Bank vs. Eaton, 141 U. S., 227, the Court quotes from the decision of the Supreme Court of Massachusetts from which the case came before them on error as follows:

"It will be observed that without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock the plaintiff paid for his shares and accepted his certificate. This he did in legal contemplation with the knowledge of the law which authorized the association and the Comptroller to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors, and such payment and acceptance of the certificates in accordance therewith might amount, under such circumstances, on his part to a waiver of the right to insist that he should not be bound, unless the whole amount of the proposed increase should be subscribed or paid in, but without insisting upon that point or deciding it, we think that the subsequent conduct of the plaintiff amounts to a ratification—118 U. S., 650. In the present case the plaintiff paid in his money but did not accept a certificate of stock."

The Court held the question fully settled by the previous cases of Delano vs. Butler and Aspinwall vs. Butler, and affirming what was said by the Massachusetts Court.

Many acts may be contrary to the provisions of the statute and so be held invalid and illegal as between the

shareholders and the corporation and yet valid in favor of creditors, or the act or contract may contravene the plain provision of the statute, and yet not be in legal contemplation void. The case of National Bank vs. Matthew, 98 U. S., 625, cites a number of such cases.

Mr. Morrawitz, in his work on corporations, section 839, says:

"When a person subscribes to the capital stock of a corporation he must be held to contemplate and intend that the corporation shall incur debts and pledge its capital, including the liability of its members for unpaid capital as security. Creditors who, in good faith, trust the corporation upon the faith of this security, stand in the position of innocent purchasers for value to the extent of their equitable lien; and it would be most unjust to permit a shareholder to disaffirm his contract and refuse to pay his share of the capital, for it has been thus pledged with his knowledge and consent to innocent third parties."

Congress could never have intended any such results to follow the use of the language used in prescribing the conditions and provisions in which national banking associations might increase their capital stock, and the Court will not put such a construction on the legislative intent as will do great injustice to those whom the law seeks always to protect, the innocent third party who contracts his debt on the faith of the capital of the association and the liability of its shareholders.

III.

The plaintiff in error is not entitled, in this case, to a recision of his contract of subscription for many reasons:

First. He does not pray for a recision, nor state facts in his answer, which entitles him to one.

Second. He does not offer to return the 18 per cent. dividends, which he admits he received, nor to account for the same.

Third. His answer shows upon its face, that he was guilty of such laches, in discovering or attempting to discover that the bank had no real surplus, which could be declared into a dividend, as bars him from asserting that that fact, as a ground of recision.

Fourth. It is too late to rescind, after the insolvency of the bank, the appointment of a receiver, and the making of an assessment upon his stock, by the Comptroller of the Currency.

First and Second.

We need not further refer to the first and second reasons, *supra.* They will appear by a mere inspection of the answer. The legal effect of the failure of the plaintiff in error, to pray a recision, or to offer to return or account for the 18 per cent. dividends received, is elementary.

Third.

The attempt to excuse the laches of the defendtnt in not sooner discovering the fraud perpetrated upon them, by alleging that the books of the bank were so falsified by the bank that the real condition of the bank could not be discovered by the utmost diligence until after the failure of the bank, is no excuse at all, in law.

The subscription was made in 1890. The bank did not fail until May 4, 1894—three years and eight months afterwards. During this time they received eighteen per cent. of the par value of their stock in dividends. It is not pretended that they made any examination of the books

until after the failure of the bank and the appointment of a receiver.

This was not diligence, but laches, for it seems that they had no difficulty in discovering false entries as soon as the bank failed, and as stockholders, they had the right to examine the books of the bank at all times.

Upton vs. Tribbilcock, 91 U. S. 45.
Sanger vs. Upton, 91 U. S. 64.
Ogilvie vs. Ins. Co., 22 How, 380.
Latimer vs. Bard, 76 Fed. page 541 and 542 and cases cited.
Chubb vs. Upton, 95 U. S. 667.

Defendants admit that they received eighteen per cent of the par value of their stock in dividends. This they propose to keep, while asking to be relieved of liability on the assessment made upon the same stock upon which they received the dividends.

This they will not be permitted to do.

Thomp. Liabil. Stockholders, 142.
Duffield vs. Iron Works, 64 Mich., 293.
Sanger vs. Upton, 91 U. S. 56 on 63 and 64.
Keyser vs. Heltz, 133 U. S. 138.

And other cases *supra.*

Effect of Insolvency.

The learned counsel for the plaintiff in error contend that it is not too late for a subscriber to the stock of a national bank to rescind his contract of subscription, after the bank has failed, the rights of creditors under the double liability clause accrued, and after a receiver has been appointed. In this case we differ with them, and think their position untenable.

There is much discussion in the authorities as to how long a subscriber to the capital stock of a corporation may stand quiescent and receive his dividends without any knowledge of any fraud in the organization of the company or increase of the capital, and after the discovery of the fraud, plead it as a defense. The rule so often invoked by parties who have been defrauded, that laches cannot be imputed to them until after the discovery of the fraud, does not apply to cases of this character.

The decisions heretofore cited from the Supreme Court of the United States and others clearly indicate this. In Chubb vs. Upton 95 U. S. 667, the Court declares that under such circumstances the subscriber must be vigilant in discovering the fraud and in repudiating it. The rule applies, as the Court says, in that case as well to the increase of the capital as to the original capital. In Upton vs. Tribbilcock, 91 U. S. 54, the Court says that the subscriber must be diligent in ascertaining the facts, his position and his liability in such case and prompt in repudiating his contract, and to the same effect is Sanger vs. Upton, 91 U. S. 63.

In Upton vs. Englehart, 3 Dillon 496, that learned judge discusses this question fully, and his opinion is cited with approval by the Supreme Court of the United States in the case to which we have referred.

If the subscriber delays discovering the fraud, or shows the want of exercise of the greatest vigilance in ascertaining the fraud imposed upon him, or the corporation, *until after its insolvency and the appointment of a receiver*, and when innocent third parties have contracted debts with the corporation, they will be held by their laches barred from setting up the fraud as any defense upon an assessment upon their stock.

This is pronounced to be the established doctrine in Cook on stockholders, Sec. 163 and by the Supreme Courts of Maryland and Michigan.

Savage vs. Bartlett, 78 Maryland 561.
Bissel vs. Heath 98 Michigan 472.
Keyser vs. Heltz, 133 U. S. 138.
Bailey vs. Sellinghost, 99 Fed. Rep. 801.
Langtry vs. Wallace, 97 Fed. 865.

In Duffield vs E. T. Barnum Wire and Iron Works, 64 Mich., 293, the doctrine of delay and estoppel is thus discussed by the Court:

"The rule that fraud vitiates all contracts, at the option of the person defrauded, applies as well to stock subscriptions in a corporation as to other contracts. Vreeland vs. New Jersey Stone Co., 29 N. J. Equity 188. Contracts induced by fraud are not void, but voidable, and the injured party has a right to have them abrogated. Relief can be had either at law or in equity, but will not be granted where the subscriber has been guilty of negligence in informing himself of the actual facts, or where, in consequence of his delay in repudiating the contract, *innocent third parties, either shareholders or creditors* have acquired rights which would be prejudiced by its recision. Thompson Liab. of stockholders 142. And it makes no difference in what aspect the question is raised, whether the subscriber who has paid for his stock repudiates the contract on the ground of fraud, and sues to recover it back, or the subscriber is sued for unpaid subscription, and defends on the ground of fraud. In either case, if the stock subscriber has been negligent in informing himself of the actual facts, *or if, in consequence of his apparent relation with the corporation as a stock subscriber, innocent third parties have acquired rights upon the faith of such relation*, which would be prejudiced by his

recision, he will be held as a subscriber, and will not be allowed, in the one case, to withdraw the capital which he has paid in, or, in the other, to escape payment." (Citing authorities.)

"The rule requiring the party defrauded to proceed with diligence to ascertain the truth or falsehood of such representations in order to entitle him to a recision of the contract, is well established in the Courts both of this country and England." (Citing authorities.)

"These decisions are based upon the ground that the *rights of creditors have intervened before the contract was repudiated*, and the insolvency of the corporation. To affect the right, there must be both creditors and insolvency or bankruptcy of the corparation before the right to rescind is exercised. In this case the right to rescind was not asserted or exercised *until after plaintiff knew of the insolvency of the corporation, and the rights of creditors*, who are represented by the receiver in this case, had intervened. It was then too late. Their rights are superior to his, because of his conduct and laches." (Citing authorities.)

In conclusion the defendant in error only desires further to call the attention of the Court to the fact that the plaintiff in error, as shown by the pleadings, subscribed for stock in this association, received the certificates, accepted dividends, and exercised all of the privileges and received all of the benefits as the holders of such stock for a period of nearly four years. They and their agents, the officers of said bank, had certified to the Comptroller of the Currency that the whole of the increased capital was fully paid in. Upon this representation he had issued to them the necessary authority to do business with the increased capital. They and their agents held themselves out to the community as having in all respects complied with the statute and

to have a full paid capital of $250,000. On the faith of this, men dealt with the bank, deposited their money with it, became its creditors, and years afterwards, after insolvency intervened, the plaintiff in error claimed to have discovered that the increased capital was not in fact paid in; pleading his own wrong, and the fraud and neglect of his own chosen agents. It is too late for this defense, and we think the judgment of the Circuit Court of Appeals, sustaining the motion of the defendant in error for judgment on the pleadings, should be affirmed by this Honorable Court.

All of which is respectfully submitted.

WM. S. SHIRK,

Attorney for Defendant in Error.

DEC 24 1900
JAMES H. McKENNEY
Clerk

Brf. of Sterry & Hagen for Plaintiffs

IN THE

Supreme Court of the United States

October Term, 1900.

C. HOOD, *Plaintiff in Error,* *vs.* **T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri.** *Defendant in Error.*	**TERM NO. 179.** (NO. 17,601.)
C. J. LANTRY, *Plaintiff in Error,* *vs.* **T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri,** *Defendant in Error.*	**TERM NO. 180.** (NO. 17,602.)

BRIEF FOR PLAINTIFFS IN ERROR IN EACH OF THE ABOVE ENTITLED CASES.

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EUGENE HAGEN,
I. E. LAMBERT,
Attorneys for Plaintiffs in Error.

By permission of the Court, this Brief is filed in No. 148. Particular attention is called to pages 27–43.

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STATEMENT OF FACTS IN EACH OF THE ABOVE CASES.

These cases were commenced in the United States Circuit Court for the District of Kansas by the defendant in error, as receiver, to recover the assessment ordered by the comptroller of the currency, against the shareholders of the Missouri National Bank, of Kansas City, Missouri, for an amount equal to $100 per share.

The petition in the case brought against C. Hood alleged him to be the owner of one hundred shares, the petition in the case against Lantry alleged him to be the owner of two hundred shares of the capital stock. In each case amended and supplemental answers, and cross-petitions were filed by the defendants. Each of these answers contained two separate and independent defenses, and also included a cross-petition to recover a judgment against the receiver for the amount paid to the bank for this stock; to each of these defenses and to each of the cross-petitions the receiver filed a general demurrer. These demurrers were, on hearing, severally sustained by the Circuit Court; no further amendments being made to the answers, judgment was finally rendered in the case against C. Hood, for the amount of the assessment claimed, to-wit: Ten Thousand Dollars ($10,000), with interest and costs, and in the case against the defendant C. J. Lantry, for the sum of Twenty Thousand Dollars ($20,000), with interest and costs.

Each of these cases were then taken upon a writ of error to the United States Circuit Court of Appeals, for the 8th circuit, and there, upon consideration, the judgment of the court below was affirmed in each case by a divided court. From these judgments of affirmance writs of error were taken to this court.

The facts stated in each of the two defenses and cross-petitions in each answer, to which the demurrers were sustained, are substantially as follows:

The Missouri National Bank of Kansas City, Missouri, was organized as a national bank in 1891, with a capital stock of $500,000, which apparently was all subscribed and paid for at the time of the organization. Early in July, 1893, this bank temporarily suspended payment. Upon its suspension the comptroller of the currency of the United States, after careful investigation into its affairs, determined that while the bank was in a sound financial condition, it should reduce its capital stock to $250,000, and that upon such reduction it would be permitted to continue its business as a national bank. The bank immediately reduced its capital stock

to the amount required by the comptroller, and on July 26, 1893, the comptroller issued two public bulletins as follows:

"This bank (referring to the Missouri National Bank of Kansas City) suspended on the 17th inst. because of a run on the part of its depositors. There was nothing in its condition to warrant this run or occasion suspicion as to its solvency. It seems to have been prudently managed and its resources are unusually free from items of questionable value, there being no bad debts. The bank is solvent and should be permitted to resume."

"The Missouri National Bank of Kansas City, Missouri, having complied with the conditions imposed by the Comptroller of the Currency, and its capital stock being unimpaired, has this day been permitted to reopen its doors for business. The bank opens with plenty of money on hand, and is wholly solvent and safe."

The bank continued in business at Kansas City from July 26, 1893, until December 3, 1896, when it was closed by order of the comptroller, and it and its business placed in the hands of the defendant in error, as receiver.

From the time of its original organization, until it was finally placed in the hands of the receiver, in December, 1896, the bank was absolutely insolvent, and in a wretched financial condition. Little or none of its capital stock (either as it was originally issued, or as it was left when it was reduced), was ever fully paid for, except, possibly, in some cases, by worthless and fictitious notes.

Prior to April 18th, 1896, of that year, the bank, through its president and cashier, sought to induce each of the plaintiffs in error (who were citizens of Kansas) to become connected with the bank, by the purchase of some of its capital stock. At the time of the negotiations with each of the plaintiffs in error, and at the time of the issuance of the certificates of stock to them, hereinafter set out, the bank was actually in a very bad condition, being utterly and hopelessly insolvent, on account of the lack of full payment in cash for its capital stock (all of which had been issued), bad loans, the withdrawal of money on fictitious notes and other paper, and on account of other reasons set forth in the answers. From the commencement of its organization up to late in the fall of 1896, the officers of the bank had so manipulated the books and assets of the

bank as to successfully conceal its actual insolvent condition from every one, including the comptroller and his examiners.

While the bank was in this condition the plaintiffs in error were induced to make an investigation into its affairs, by the false and fraudulent representations of its officers, with the view of becoming connected with it through the purchase of some of its capital stock; they made the most careful and searching investigation, as to the actual condition of the bank that it was possible for people situated as they were to make.

In this examination they found, not only the very favorable reports of the bank examiners, made from time to time, but also the certificates of character, and good standing, issued by the comptroller upon the re-opening of the bank on the 26th of July, 1893, as above set out. The plaintiffs in error employed to make this examination two expert bank examiners. These examiners were deceived, as had been the government examiners, and as finally were these plaintiffs in error, through the false and fraudulent representations of the president and cashier, and the false and fraudulent concealment of the facts, made by the manner in which the books were kept, and by the fictitious and forged bills receivable, and other fraudulent practices of these officers and others. At the very beginning of these negotiations, and from that time on, the president of the bank made to the plaintiffs in error, and to each of them, fraudulent and false representations, as to the condition of the bank, its resources and liabilities; representations that induced the plaintiffs in error, and each of them, to believe that the bank was perfectly solvent, and in the splendid condition that the comptroller believed it to be in when he issued to the public his bulletins above set out. The records of the bank at that time disclosed that the average daily deposits amounted to $1,500,000, and that its loans, in the shape of bills receivable, averaged about $1,300,000. While each of the plaintiffs in error believed and relied upon the false and fraudulent representations of the president and cashier, they left nothing undone, that was possible for men situated as they were

to do to fully acquaint themselves with the actual condition of the bank, before making the investment.

Prior to these negotiations certain stockholders of the bank induced the bank to purchase their stock from them, under threat to throw the stock they wished to sell on the market at such prices as would create exposure of the actual condition of the bank. The bank, under these threats, during the time referred to, attempted to purchase about 800 of its outstanding shares of capital stock, and paid to the stockholders holding the same the prices asked, either in cash belonging to the bank or by surrender of notes given by these stockholders in payment of the stock sought to be purchased, or by cash and by surrender of notes, as the case might be. Each of the persons engaged in these transactions knew that the bank was the real, actual attempted purchaser of the stock, and that its funds and its assets were being used in payment for the stock thus attempted to be purchased. In order to conceal the transaction from the knowledge of the government, and every one else the certificates for this capital stock held by the persons with whom these attempted purchases were made were either endorsed by such persons in blank or assigned to the name of some employe of the bank, and then delivered to the bank by the persons attempting to sell. The bank, upon receipt of the certificates, would substitute the worthless notes of insolvent employes of the bank for the cash paid, or assets used, by the bank in such attempted purchase. None of this stock, so attempted to be purchased, was taken, or purchased, or procured by the bank to prevent any loss or losses, upon any debt or debts previously contracted in good faith, or purchased in any way authorized by law, but was attempted to be purchased by the bank with its funds or assets for the sole purpose of preventing such stock from being sold in open market, and to prevent the owners of it from making an investigation into the actual condition of the bank. None of the parties in whose names the certificates for the capital stock attempted to be purchased was transferred ever paid anything for the stock, neither did they, or any of them, ever intend

to pay anything for the stock, or to pay any of the notes given to the bank to replace its funds used in the purchase of the stock, because it was agreed between them and the executive officers of the bank, that they should hold the stock in trust for the bank, and for its sole use and benefit. When the plaintiffs in error finally determined to purchase stock of the bank, they were informed by the president of it that the bank held some of its own stock, taken by the bank from debtors to prevent loss on debts previously contracted in good faith, and that the officers of the bank could purchase some more from friendly stockholders who were anxious to have plaintiffs in error become stockholders in the bank. Hood thereupon, about April 18, 1896, agreed to purchase one hundred shares of this stock from the bank at par value, to-wit: $100 per share, and Lantry agreed to purchase from the bank two hundred shares of the stock at par value of $100 per share, and Hood paid to the bank $10,000 in cash, and Lantry paid to the bank $20,000 in cash, and each received certificates for the number of shares of the capital stock alleged in the respective petitions filed in the court below by the receiver to be owned by them.

From the time the certificates of stock were issued to these plaintiffs in error up to the time the bank went into the hands of a receiver, nothing occurred in the management of the bank to arouse the suspicion of the plaintiffs in error, nor did they suspect anything until it was actually taken possession of by the receiver on December 3, 1896. At that time the books containing the history of the bank and the bank's affairs were turned over to the receiver, and *plaintiffs in error were severally denied access to them.* They made persistent efforts to secure all information possible about the bank's condition after the receiver was appointed, but were prevented from doing so by the receiver persistently refusing and denying such request (Transcript p. 10), sometimes giving as an excuse assurances that the bank was solvent and would pay its debts. Not satisfied with these refusals made to them by the receiver, they made appeals to the comptroller to permit them to investigate and

ascertain the actual condition of the bank, and permission was finally granted to them about the first day of September, 1897, to make such investigation. They at once procured the services of an expert bank examiner, who secured for them a history of the bank, as far as it could well be done. As soon as this report was made to them by their expert, *they became aware for the first time* of the frauds that had been perpetrated upon them, and that the bank had been hopelessly insolvent since its suspension in 1893, if not from the beginning.

Immediately upon learning this, they tendered their stock back to the receiver and demanded the return of their money. It will thus be seen that they had made the most careful and prudent investigation of the bank's affairs before they attempted to purchase any stock, and when it went into the hands of a receiver, made every effort in their power to ascertain its actual condition, and that, as soon as they became aware of the condition at the time of their purchase, they at once tendered the stock back and rescinded the contract of purchase. The character of the frauds finally discovered were not those such as occur between parties who deal with each other at arm's length, but were frauds that had been so adroitly concealed and covered up that they had escaped the detection for years of directors, stockholders, depositors, creditors—and even the vigilance of one of the ablest comptrollers of the currency that had ever occupied that office, together with his large force of expert bank examiners upon whom was conferred by law not only ample power to make full investigation, but the absolute duty of guardianship over banks like this one for the purpose of detection of such frauds. Not only did these frauds escape the detection of the comptroller's office, but that very office had placed a barrier in the way of their detection by certifying to the world that the bank was in a healthy and prosperous condition at a time when it was in truth rotten. After it went into the hands of a receiver, these frauds were not brought to light and made known to the world by the only person who was clothed with the power and charged with the

duty to do so, but it was left for these defendants to secure, after many efforts, permission from the comptroller's office to do so, and thereby learn for the first time that which should have been disclosed willingly by the receiver to every one interested.

On August 30, 1897, prior to obtaining permission to investigate, and while no one unless it was the comptroller, his receiver and the officers of the bank, were aware of the facts stated, the comptroller of the currency ordered an assessment of $100 per share against each shareholder. Each of the plaintiffs in error refused to pay this assessment, pending the investigation they were engaged in making, and were thereupon sued.

The answer setting out in detail the facts above stated is found on pages 5 to 16 of the record in case numbered 17,602 (term No. 180), and pages 5 to 16, in case numbered 17,601 (term No. 179).

There is in each case practically three main questions presented by the sustaining of the demurrers in the court below, and the affirmance of its ruling, by the Circuit Court of Appeals, which are as follows:

1st. Did the certificates issued by the bank to the plaintiffs in error make the plaintiffs in error shareholders of the bank liable to the assessment ordered?

2nd. Did these plaintiffs in error under the admitted facts have the right to rescind their contract of purchase of this stock at the time when they attempted to do so, and relieve themselves from the liability of the assessment ordered?

3rd. Had the plaintiffs in error the right to present their claims against the receiver, for the money paid to the bank at the time of their attempted purchase of this stock in a cross-petition filed in these causes of action commenced by the receiver to recover these assessments?

Assignment of Errors in Case No. 17,601.

(Title of cause omitted.)

1st. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant therein, C. Hood.

2nd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and set forth in the amended and substituted answer of defendant therein, C. Hood.

3rd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in favor of plaintiff, T. B. Wallace, as such receiver, against the defendant, C. Hood, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. Hood.

4th. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

Wherefore, the defendant, C. Hood, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the rendition of such judgment.

Assignment of Errors in Case No. 17,602.

(Title of cause omitted.)

1st. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant therein, C. J. Lantry.

2nd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and

set forth in the amended and substituted answer of defendant therein, C. J. Lantry.

3rd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in favor of plaintiff, T. B. Wallace, as such receiver, against the defendant, C. J. Lantry, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. J. Lantry.

4th. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

Wherefore, the defendant, C. J. Lantry, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the rendition of such judgment.

POINTS AND AUTHORITIES.

FIRST POINT.

The Circuit Court erred in sustaining the demurrer to the second defense in each answer, as the admitted facts in each of such defenses clearly established the proposition that neither one of the plaintiffs in error were shareholders of the Missouri National Bank, at the time of the levy of the assessments sought to be collected in these actions.

I.

We briefly re-state the facts upon which this defense, in each case, is based:

The bank, having all of its capital stock outstanding, attempted, through its officers, to purchase 800 shares of such stock, from some of its shareholders, to prevent a threatened exposure, of its actual insolvent condition, by the parties holding such shares of stock. To carry out this scheme the officers of the bank took of its assets, a sufficient amount thereof, to pay for the purchase of these 800 shares to the holders thereof the prices agreed upon, and paying for the same, had the stock certificates, which had been issued therefor transferred, by the actual owners of these certificates and the stock represented by the same, either directly to the bank, or to some of its employes, to hold in trust for the bank. All parties to this transaction knew that the bank was using its assets to make this purchase, for the purpose stated, and for no other purpose, and that said purchase was being made for the bank. These transactions between the bank and its shareholders were bald, open violations of Section 5201 of the Revised Statutes of the United States, to the knowledge of all concerned. Upon receiving these certificates from its shareholders who owned them, the bank cancelled them, or a sufficient number of them, to enable it to deliver, without an apparent over-issue, a certificate to

plaintiff in error Hood for 100 shares, and a certificate to plaintiff in error Lantry for 200 shares (see printed Transcript, case No. 17,601, pages 12 to 15, and case No. 17,602, pages 12 to 15).

II.

That this attempted purchase of a portion of its own capital stock by the bank for the purpose admitted was *void* and not merely *voidable*, seems no longer to be an open question in this court, under the principles determined by it in the cases of:

California Bank v. Kennedy, 167, U. S., 362;

First National Bank of Concord v. Hawkins, 174 U. S., 364.

III.

The certificates, which were transferred to the bank, upon its attempted purchase of these 800 shares of stock, did not vest in the bank, either the possession of the stock, or the title to a single one of the shares, represented by such certificates. The certificates, *not being the stock itself*, but merely evidence of the ownership of the stock represented by them, could not, upon delivery to the bank, in direct violation of the provisions of the statute, divest the people transferring them, of their title to the stock, evidenced by such certificates.

Mr. Cook, in his work on Stock, Stockholders and Corporation Law (2nd ed.), paragraph 10, states the legal character of certificates of stock in corporations as follows:

"Certificate of Stock:—A certificate of stock is, from one point of view, a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the shareholder in the corporate property and franchises; it operates to transfer nothing from the corporation to the shareholder, but merely affords to the latter evidence of his rights. It should be clearly apprehended that the certificate is not the stock, but merely written evidence of the ownership of shares. Accordingly, it follows that shares have no 'ear marks'—that one share cannot be distinguished from another share—but that it is only the certificates which are distinguishable one from the other by their numbers and in other ways. The certificate, therefore, has value in itself only as evidence, and apart from the shares

which it represents, it is utterly worthless. And even as evidence, it is not in every case essential; it is merely a convenient voucher, which the shareholder has a right to receive if he asks for it. One element of its value to the shareholder is that it is prima facie evidence of his title."

Judge Thompson, in his recent work on Corporations, volume 2, section 2348, states the proposition as follows:

(The italics are ours.)

"And, first, it is to be observed that such a certificate is merely the paper representative of an incorporeal right, and that it stands on a similar footing to that of other muniments of title. It is not in itself *property*, but is merely the *symbol* or paper evidence of property. Hence, the proprietary right may exist without the certificate. Numerous cases accordingly hold that a person may acquire the rights and incur the liabilities of a shareholder, both to the corporation and to its creditors, although no certificate has, in fact been issued. Corporate shares have also been classed as 'securities.' And although they may be thus designated within the meaning of particular statutes, yet it is plain that they are not securities in the proper sense of the word. 'Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation in which he is a member.' The following further observations in the same line of thought were made by Mr. Justice Crockett: 'If a firm doing business as an ordinary partnership issue certificates to each of its members specifying the interests of the respective copartners, such certificates would have no intrinsic value, except as evidence of the *quantum* of interest of each copartner. The joint interest of the copartner in the property and business of the firm is the substance of the existence of which the certificate is but the evidence. If, for example, there be three copartners, each owning an undivided interest of one-third, there is no appreciable difference between the respective interests. They are in all respects precisely similar, and each several interest is an exact duplicate of the others. The same principle is applicable to corporations. The holder of ten shares of stock stands precisely upon the same footing as any other holder of ten shares. Their interests are precisely similar and of the same value, and each holds but an undivided interest in the common property.' From the principle that the certificate is not the property itself, but merely the muniment of title, it has been held that the duties, privileges and responsibilities of the holder of it cannot be divested by the mere act of writing across the face of it the word 'cancelled,' and returning it to the secretary of the com-

pany. As a certificate is not necessary to make one a shareholder, *so the surrender of it to the company does not necessarily make the holder of it cease to be a shareholder.*"

See also:

Telegraph Co. v. Davenport, 97 U. S., 369;

St. Romes v. Levee Cotton Press Co., 127 U. S., 614;

Hammond & Co. v. Hastings, 134 U. S., 401;

Johnson v. Laflin, 103 U. S., 800;

National Bank v. Watsontown Bank, 105 U. S., 223.

The case of Burrows v. Niblack, decided by the Circuit Court of Appeals of the 7th circuit (84 Fed. 111), is precisely in point. This case was an action brought by the receiver of the Chemical National Bank of Chicago, to recover from Burrows $10,000 paid to him, by that bank for a hundred shares of its own outstanding capital stock, attempted to be purchased from Burrows, while it was a going concern. We quote from the opinion in this case, illustrative of the point in question, as follows:

(The italics are ours.)

"The principal objections urged are: (1) That the validity of the purchase by the bank of its own stock can be questioned only by the government; (2) That the alleged liability of the bank for the return of the money can be enforced only in a court of equity; and, (3) That a tender back of the shares of stock purchased, was essential to the right of recovery of the price paid. The first objection is based upon that line of decisions of which illustrations are found in Bank v. Matthews, 98 U. S., 621; Bank v. Whitney, 103 U. S., 99; and Thompson v. Bank, 146 U. S., 240, 13 Sup. Ct., 66; but the present case, as we think, is governed rather by the principles declared in McCormick v. Bank, 165 U. S., 538; 17 Sup. Ct., 433; and Bank v. Kennedy, 167 U. S., 362; 17 Sup. Ct., 831, where the line of cases mentioned is distinguished. The transaction here in question was not a purchase made for the purpose of preventing, or which was necessary to prevent, loss upon a debt previously contracted, but as set forth, it was a bald purchase by the bank of its own stock for cash, and necessarily involved for the time being a reduction *pro tanto* of the corporat- stock. Even if it were not forbidden by the statute, the transaction would be inconsistent with public policy and with established principles of law. The suggestion that a reduction of stock by a national bank may be lawfully made under section 5143 of the revised statutes is irrelevant because it is not shown, and

without proof is not to be presumed, even if it were conceivably possible, that this transaction could have been justified under the provisions of that section. The purchase was outside of and beyond the powers of the bank, and therefore, as a corporate act, was void from the beginning; and, while it appears from the agreement that the certificates of stock were endorsed in blank and delivered to the president of the bank, *the latter did not thereby acquire, nor the plaintiff in error part with, title to the stock.* The money having been unlawfully paid out, the bank had an immediate right of action to recover it in an action of assumpsit. *It was not necessary to go into equity nor to offer a return of stock.*"

This Court has practically held that in such case it is not necessary to make any tender or demand.

Pence v. Langdon, 99 U. S. 578.

IV.

The shareholders, from whom these 800 shares of the bank's capital stock, was attempted to be purchased by the bank, remained, after the transfer of the certificates to the bank, or its employes, just as much, the owners of the stock, attempted to be transferred, as they were prior to such attempted transfer. They were the persons, whom the receiver, should have called upon to pay these assessments, instead of calling upon the plaintiffs in error. It has been constantly held, by the Federal Courts (including this court) that the real owner, of the shares of capital stock, of an insolvent corporation, is the party who should be held liable, for assessment, where an assessment of stockholders for the benefit of creditors is authorized.

Pauly v. State Loan and Trust Co., 165 U. S. 606, and cases therein cited;

Stuart v. Hayden, 169 U. S., 1;

Lucas v. Coe, 86 Fed. 972.

V.

The certificates issued to Hood and Lantry, purporting to convey one, and two hundred, shares of its capital stock, were each for an actual over-issue of stock, and hence did not, make either Hood, or Lantry, a shareholder in this bank. In support of this

proposition, we quote from the text of Cook on Stockholders, etc. (4th Ed., Par. 292).

"By over-issued stock is to be understood stock issued in excess of the amount limited and prescribed by the act of incorporation. Certificates of stock issued in excess of the certificates that represent the full authorized capital stock of the corporation represents over-issued stock. Such stock is spurious and wholly void. This is the settled law, and it prevails equally whether the over-issue is the result of accident or mistake, or want of knowledge of the law, or is due to fraud and intentional wrong-doing. The *animus* or intent of the parties to the over-issue is not material. Over-issued stock, no matter how over-issued, represents nothing, and is wholly and entirely valueless and void. So rigid and well established is this rule that not even a *bona fide* holder of such stock can give to it any validity or vitality."

The leading case upon this subject is that of New York, etc., R. R. Co. v. Schuyler, 34 N. Y., 30.

If these certificates, represented nothing but over-issued stock, under the decision of this court, (Scovill v. Thayer, 105 U. S., 143), neither Hood, or Lantry, acquired any rights as stockholders in this bank, or assumed any liability, for the assessments in controversy.

See also the decision of the United States Circuit Court of Appeals, eighth circuit, in the case of Laredo Improvement Co. et al. v. Stevenson (66 Fed., 633); and the following cases:

Kampmann v. Tarver (S. C. of Tex.), 29 S. W., 768;

Kellerman v. Maier, et al., 116 Cal., 416;

Christenson v. Eno, 106 N. Y., 97;

Andrews et al., v. National Foundry & Pipe Works, 22 U. S., C. C. A. Rep., 110;

Gillman v. Gross (S. C., Wis.), 72 N. W. R., 885;

Tschumi v. Hills (C. A., Kas.), 51 Pac. 619;

Follett v. Stevens et al., 43 Fed. Rep., 842.

In view of the above decisions, it seems to us that the reasoning of the court below upon this proposition was unsound (printed transcript, pages 29 to 39). The court below admits, that the transaction between the bank, and its shareholders, in the at-

tempted purchase of this stock, was *ultra vires*, but then proceeds to argue, that because the bank fraudulently took the money, of plaintiffs in error, and thereby restored its impaired assets, to that extent, the plaintiffs in error, were in no position, to take advantage of this transaction, for the purpose of relieving themselves, of the liability to an assessment. In other words, the court held: That the law imposed upon each of the plaintiffs in error, a penalty, for the sole reason, that the bank, had been able to defraud each of them, in a case, where neither of the plaintiffs in error, were guilty of any laches, holding further that, this penalty, was imposed for the sole benefit of persons who would have received precisely the same benefit, if the assessment had been levied against the real owners of the stock, who had attempted fraudulently to rid themselves of such a burden.

The court also held that only the government had the right to inquire into such transactions, although the transactions were prohibited both by the statute, and by public policy, overlooking the principles, determined by this court in the recent decisions in McCormick v. Market Nat. Bank (165 U. S., 538); California National Bank v. Kennedy, *supra;* First National Bank of Concord v. Hawkins, *supra.*

The majority of the court below, also overlooked the fact, that the transfer of the certificates, to the bank, was not the transfer of the stock itself, and overlooking this, assumed that the shares of stock, attempted to be sold to the bank, were themselves, in some way, transferred to the bank, and by the bank transferred to each of the plaintiffs in error. This will be seen by reading the opinion of Justice Thayer, from which we quote the following paragraph:

"The creditors of the bank who must be presumed to have extended credit on the security afforded by the capital stock and the statutory liability incident thereto, cannot be deprived of such security, either by the fact that the defendant was fraudulently induced to become a shareholder or by the further fact that the bank had wrongfully acquired the stock which it subsequently sold to him, when it appears that he knowingly became a registered shareholder and remained such for eight months and until insol-

vency supervened and in the meantime enjoyed all the rights and privileges incident to that relation."

That this position of the court is untenable, must, upon consideration be apparent. All will concede, that if the capital stock was all outstanding, at the time of the issuance of the certificates to the plaintiffs in error, that such certificates only represented over-issued stock, and under the decisions of this court (in Scoville v. Thayer, and other cases cited), and would be absolutely void. The fact that Hood and Lantry for eight months severally acted as shareholders on the faith of such certificates being valid gave no validity to such certificates.

Can it be possible, that because of the fact, that prior to the issue of the two certificates, to the plaintiffs in error, the bank had attempted to purchase 800 shares of its capital stock, and had cancelled the certificates therefor assigned to it to the amount of the shares, attempted to be transferred to plaintiffs in error, that the certificates in question, were of any more validity, than they would have been, if at the time of their issuance, the bank had not made these attempted purchases, and all of its capital stock appeared to be (as it actually was) outstanding, upon the books of the bank.

If the position of the court below be correct, that the bank got actual possession of these 800 shares of capital stock as tangible things, through its transaction, and actually sold, and delivered 300 of these 800 shares to the plaintiffs in error, it would not follow that the plaintiffs in error, became shareholders, because it must be conceded, that the bank never got any title to any one, of these 800 shares; that neither it, or its receiver, would, under the decisions of this court, be estopped to say in any litigation whatever, that it did not acquire the title to a single share of this total of 800 shares.

Hence it follows that plaintiffs in error, by their purchase from the bank, got nothing, and should be no more estopped to say, that they did not acquire anything, than their assignor, or its receiver, would be estopped to say, the same thing, if upon a distribution of assets by the receiver, after paying the debts, the

plaintiffs in error claimed some part thereof as shareholders. If the receiver, had sued some of the shareholders, who transferred their certificates to the bank, to recover from them the assessment made against such transferred stock, could such shareholders have successfully defended, upon the ground, that although the transaction, between them, and the bank, was void, yet the bank was not injured thereby, having sold to the plaintiffs in error, the same shares of stock and that the plaintiffs in error, were the ones liable to such assessment, instead of themselves? We think it surely must be the law, that the receiver, could recover a judgment against any one or all of the parties, who attempted to transfer this stock, for the assessment of the stock attempted to be transferred. If this view be correct, would any court hold, that the plaintiffs in error would also be liable, for an assessment upon the same stock? No creditor has the right to ask for an assessment of any number of shares, of the capital stock, of an insolvent national bank, beyond the number actually authorized to be issued, or which may have been issued through some attempted compliance with an authorization therefor.

VII.

That the doctrine of estoppel as applied by the court, below, has no application, to one holding over-issued shares of stock, is, as it seems to us, thoroughly settled by the decisions of this court in Scovill v. Thayer, Bank v. Kennedy and Bank v. Hawkins, *supra*.

We had supposed that this point was thoroughly settled by the court below, in a decision rendered by it on March 4, 1895, in the case of Laredo Imp. Co. et al. v. Stevenson (66 Fed. 663), until it rendered its decision in the case at bar. We quote from the opinion in that case as follows:

"Is the defendant estopped by the fact that he once voted his stock, and that the officers of the corporation represented that its capital had been increased to $1,200,000, from asserting, against the creditors of the corporation, that the stock issued to him was void? This question must be answered in the negative. Where a corporation has power to issue stock or to increase its capital stock,

and this power is defectively or informally exercised, the acts and acquiescence of the stockholder may estop him from denying the validity of the stock or his liability therefor. Upton v. Tribilcock, 91 U. S. 45; Chubb v. Upton, 95 U. S. 665; Pullman v. Upton, 96 U. S. 328; Hadley v. Stutz, 139 U. S. 417, 425, 11 Sup. Ct. 530; Veeder v. Mudgett, 95 N. Y., 295, 310. But where the corporation is absolutely without power to issue the stock, or to increase the capital stock above a certain limit, no act or consent of the stockholder who receives stock issued without authority can estop him from denying the validity of the stock, or his liability therefor. The holder of such stock is under no obligation to pay for it, because he has received no consideration for such an obligation. The stock issued to him is absolutely void. He is not estopped to deny its validity, as against a creditor of the corporation, for the foundation of estoppel is deceit, and the creditor cannot be deceived as to the power of a corporation to issue such stock. He is bound to examine and know the law which limits the powers of the corporation with which he deals, and, whether he examines it or not, he is charged by the law with the knowledge of it. Scovill v. Thayer, 105 U. S. 143, 149; American Tube Works v. Boston Mach. Co., 139 Mass., 5, 29 N. E. 63; Reed v. Machine Co., 141 Mass. 454, 5 N. E., 852; Lathrop v. Kneeland, 46 Barb., 432; Merrill v. Gamble, 46 Iowa, 615; Merrill v. Reaver, 50 Iowa, 404; Clark v. Turner, 73 Ga., 1; Lincoln v. Express Co. (La.) 12 South, 937."

See also to same point:

Chemical Natl. Bank of New York v. Cal. Natl. Bank, 120 Cal., 601;

Kellerman v. Maier, et al., 116 Cal., 416;

Christenson v. Eno, 106 N. Y., 97;

Andrews, et al., v. Natl. Foundry & Pipe Works, 22 U. S. C. C. A., 110;

Gillman v. Gross, (Wis.) 72 N. W., 885.

Kampmann v. Tarver (Tex. S. C.), 29 S. W. R., 768;

Winters v. Armstrong, 37 Fed. 509.

Hayden v. Charter Oak Driving Park, 63 Conn. 142;

Page v. Austin, 10 Can. Sup. Ct. 132;

Clark v. Turna, 73 Ga. 1;

Insurance Co. v. Kamper, 73 Ala., 325;

Veeder v. Mudgett, 95 N. Y., 295;

Mallory, et al. v. Hananer Oil Works (S. C. Tenn.), 8 S. W. Rep. 396.

SECOND POINT.

The court below erred in sustaining the ruling of the Circuit Court upon the demurrer to the first defense in each answer.

FIRST.

The appointment of a receiver for this bank, and the making of the assessment ordered by the comptroller, did not limit or destroy, the right of either of the plaintiffs in error, to disaffirm their contract, with the bank, for the purchase of the shares of stock, from the bank, under the admitted facts stated in each of the defenses.

I.

Preliminary to the discussion of the proposition stated we recall the court's attention to the following facts, to wit:

The plaintiffs in error, at the time when these actions were brought, were still in utter ignorance of the actual condition of the Missouri National Bank of Kansas City. While at that time they had the right to assume that each of them had been induced to purchase this stock from the bank through fraudulent representations made by it, owing to its then inexplainable insolvency, yet the receiver, by his persistent refusal to permit them to investigate the books and other records of the bank, prevented their ascertainment of the actual facts in the case, which possibly would make a defense upon that ground. Subsequently, in September, when they finally obtained permission from the comptroller to make an investigation, the first find they made in such investigation, was the fact of the utter insolvency of the bank, from the time it commenced business, until the time its doors were finally closed; such fact at once disclosed, for the first time, to them, that the representations made to induce the purchase of stock were false and fraudulent, and entitled them to rescind their contract of purchase, which they at once did, and then plead the facts concerning the fraud and their rescission, in their answers, before the subsequent discovery, that the bank had no stock to sell. Subsequently, after the filing of

the first answers, setting out these defenses, the further investigation by their experts into the affairs of the bank revealed the fact that the bank did not own any stock at the time of its attempted sale of three hundred shares to them. Upon the ascertainment of this further fact, the present answer was filed, containing each of these defenses, as additional to those already filed. These parties, and their counsel, yet feel that, under the uncertainties of the situation, induced by the fraudulent system of keeping the books, and accounts, of the bank, each of these defenses should be maintained, to meet any possible proof, that may be made by the receiver. While each one of these defenses is distinctive from the other, each one is to some extent, interwoven with the other. The first defense sets out at length the sale to the plaintiff in error, Hood, of one hundred shares of stock, and to the plaintiff in error, Lantry, of two hundred shares of the capital stock of this bank, by the bank, under such fraudulent representations as would, without question, so far as the bank was concerned, entitle Hood, and Lantry, to severally rescind the contracts of purchase, and recover from the bank the price paid, at the time when the rescission was made.

These sales were made April 18, 1896, and the bank was put in charge of the receiver December 3, 1896. The receiver, upon taking charge of the bank, entered into and retained possession of all of its property, including the rooms and furniture, where it did business, and the executive officers of the bank, left the state of Missouri, prior to the discovery of the fraud, by the plaintiffs in error.

Plaintiffs in error, upon ascertaining the fraud practiced *at once* tendered to the receiver the certificates of stock, which had been issued to them, and demanded of him the repayment of the money paid by them to the bank for such stock. The receiver was at that time in sole possession of the bank, its rooms, and its assets, and he was the only one who could allow, at that time, these claims as claims entitled to participate in the distribution of such assets as he might thereafter distribute to creditors.

II.

Under the Kansas Code of Civil Procedure as construed by the Supreme Court of that state, the rule of the common law, with reference to the construction of pleadings demurred to, does not obtain; but on the contrary the rule in force in that jurisdiction, is, that not only every fact stated, or attempted to be stated, (however defectively) in pleadings, must, as against a demurrer, be construed, not only most favorably to the pleader, but only those presumptions, which are in favor of the pleader, (arising from the facts plead,) can be considered by the court in construing such pleadings.

Stewart v. Balderson, 10 Kas., 148;
Crowther v. Elliott, 7 Kas., 235;
Stringfellow v. Alderson, 12 Kas., 112;
McPherson v. Kingsbaker, 22 Kas., 646;
State v. School District, 34 Kas., 241;
Street Railway Co. v. Stone, 54 Kas., 83.

Section 914 of the Revised Statutes of the United States, requires the adoption of this rule, by the Circuit Court, of the United States, for that district, in all common law cases, where it would be applicable.

Glenn v. Sumner, 132 U. S., 152;
Roberts v. Lewis, 144 U. S., 653;
Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S., 24.

Construing the allegations, in each of these defenses, against the general demurrers, filed to them, under either the rule of the common law, or the Kansas rule, it would be difficult to conceive of a more startling case of fraud, than that, which was perpetrated, upon each of the plaintiffs in error, by the bank itself, and which fraud admittedly, induced their several purchase of the 200 and 100 shares of its capital stock.

It will be admitted by all that the discovery of this fraud, at any time prior, to the appointment of the receiver, would have

given to each of the plaintiffs in error, the instant right, to rescind their several contracts of purchase, regardless of any question of solvency, or insolvency, of the bank at the time of the rescission.

Smith v. Reese River Mining Co., Law Reps., 2 E. Q. 264;
Venezuela Co. v. Kisch, Law Rep. 2 H. L., 99;
In re Brinsmead & Sons, 67 Law J., Ch. 11, 1 Ch. 104. 77 Law, 7 (N. S. 521);
Motor Co. v. Parnell, 75 Md., 113;
Tyler v. Savage, 143 U. S., 79;
Barnes et al., v. Gates (C. C. A., 4th Ct.), 89 Fed., 783.

II.

The right of one, who by fraud, has been induced to purchase, from a national bank, shares of its capital stock, to rescind such purchase, and thereby release himself, from the liability imposed by the statute, is based upon the proposition, that the liability of a shareholder, in a national bank, under the provisions of Section 5151 R. S., is, in most cases, voluntarily assumed, by the contract of purchase, and, therefore, in such cases, contractual in its nature, standing or falling, with the contract creating it. The failure on the part of the court below, to recognize this proposition is, we believe, the chief cause, for the decision complained of. The question whether this liability, under the provisions of similar statutes in various states, is a contractual one, or not, has been determined several times, by this court, and notably by it in its recent decision, in Whitman v. National Bank of Oxford (176 U. S., 559), where many of the authorities, are reviewed.

See also:

Hawthorn v. Calef, 2d Wall, 10;
Flash et al. v. Conn, 109 U. S. 371;
Richmond et al. v. Irons et al., 121 U. S., 27;
Stewart v. Hayden, 169 U. S., 1.

While every person, who becomes a creditor, of a national bank, has the right, to rely upon the fact, that if the bank, should become insolvent, while he remains a creditor, its registered share-

holders, would *prima facie* be liable to an assessment, equal to the amount, of the outstanding capital stock, held by them, yet one giving credit, to a national bank, has no right to rely upon the fact, *that any one individual shareholder, will remain such shareholder* (subject to the liability of the statute) *for any period of time*, however much such person's connection with the bank may have influenced the credit given; neither has such a person the right to *conclusively* presume that the names of those appearing on the list, of registered shareholders, upon the insolvency of a national bank, are all rightfully there.

Whitney v. Butler, 118 U. S., 655;

Stuart v. Hayden, *supra.*

Every creditor, or proposed creditor, of a national bank, is charged with the knowledge, that every shareholder, of such bank, can cease to be a shareholder, and relieve himself, from the liability, assumed by the ownership of some of its shares, at any time, either by the transfer in good faith, on the registry of the bank, of his shares of stock, to some one else, or by rescission of the contract, which created him a shareholder, when the right of rescission exists. To presume, therefore, (as did the court below) from the facts stated in each of these defenses, that during the connection of the plaintiffs in error, with the bank, their names obtained for it credit, it otherwise, would not have had, not only ignores the Kansas rule referred to, concerning presumptions arising from pleadings demurred to, but adds no argument against the right of each of the plaintiffs in error to rescind the contract at the point of time each did rescind. This several right on their part, to rescind their several contracts of purchase was created by the principles of the common law, and not by force of any statute. There being no statute giving the right to rescind, under facts such as are stated in these defenses, or under any state of facts for that matter, or fixing the time, within which such rescission should be made, the time, of the exercise of such right, is only limited, and controlled, by the requirements of the common law which created it. The only limitation imposed by the common law, as to the time,

when the right of rescission must be exercised, in this class of cases, is, that it must be exercised, within a promptly reasonable time after discovery, (by the party injured), of the fraud creating such right. The proposition above stated, is well illustrated, in the analogous cases of insolvency, where there has been an assignment, or a receiver appointed, and is also illustrated, by the decisions, under most bankruptcy laws. In such cases, it has generally, (if not universally) been held, that the assignment, or the appointment of a receiver, in no way affects rights, which could be asserted against an assignor, or bankrupt, if no assignment had been made, or receiver appointed. This is well illustrated, by the following decisions of this court, each of which, seems to us, very applicable:

Donaldson, assignee, v. Farwell, et al., 93 U. S., 631;
Yeatman v. Savings Institution, 95 U. S., 766;
Stewart v. Platt, 101 U. S., 738;
Porter v. Lazea, 109 U. S., 84.

Guided by the common law, (there being no statute), this, and other courts, have frequently held, that a receiver, of a national bank, upon his appointment, takes *all* of the assets of the bank, (including the shareholders' liability), in trust, for the creditors, and the stockholders, *subject to all claims, and defenses, that might have been interposed, against the insolvent corporation itself, with respect to any of such assets.*

Scott v. Armstrong, 146 U. S., 499;
Whitney, et al., v. Butler, 118 U. S., 655;
Briggs v. Spaulding, 141 U. S., 132;
Finn v. Brown, 142 U. S., 56;
Winters v. Armstrong, 37 Fed., 509;
Cutting, Receiver, v. Damerel, 88 N. Y. 411;
Hayes v. Shoemaker, 39 Fed., 319;
Young v. McKay, 50 Fed., 394;
Snyder v. Foster, 73 Fed., 136.

As stated by this court in the head-notes to the case of Scott v. Armstrong, *supra*:

"The receiver in such case takes the assets in trust for the creditors, and, in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed against the insolvent corporation."

See also:

Fourth Street Bank v. Yardley, 165 U. S., 653;

Yardley v. Philler, 167 U. S. 360.

The proposition as stated in Winters v. Armstrong, (37 Fed. 508) in reference to the question here discussed by the late Justice Jackson is as follows:

"The receiver stands in the shoes of the bank and can assert no rights against the subscribers which the bank could not have asserted."

One of the most important assets, that is vested in a receiver of a national bank, is the liability of the shareholders, of such bank, to respond, to an amount equal, to the face value of the shares of capital stock, held by them. It is hard to perceive upon what theory a shareholder, might prevent the enforcement of any other liability by a receiver of a bank growing out of a contract made with the bank while it was a going concern, on the ground that such contract, was induced by the fraud of the bank, and yet not have the right, to make the same defense, against his liability as a stockholder, in a case, where he was induced to become a shareholder, through a contract with the bank procured by fraud, and in a case where he has not been guilty of laches, in not discovering the fraud, prior to the appointment of a receiver.

III.

Following the principles established by the authorities above cited, it has generally been held, in the United States, where the question has arisen, that the assignment of, or the appointment of a receiver, for a corporation, on account of insolvency, does not, of itself, cut off from a stockholder in such corporation, his right to rescind his contract of subscription, or purchase of stock, induced by the fraud of the corporation if he has not been guilty of laches, in asserting such right.

In the eighth circuit, until quite recently, this proposition was considered to be the settled law, of the federal courts, in that circuit, as will be seen, by reference to the following cases:

Upton v. Englehart, 3 Dill. 496, was a suit brought by the assignee of an incorporated company to recover on the stockholders' liability; the defendant pleaded that he was induced to purchase the stock by the fraudulent representations of the agent of the company, and that he was in no way bound thereby, and that he not long ago repudiated said purchase by refusing to pay any more of the installments. Judge Dillon held the plea to be defective, because it did not show that the defendant made use of reasonable diligence to make himself acquainted with the matters in respect of which the fraud is claimed, nor when or how he repudiated the contract. And after referring to Oakes v. Turquand, and other English cases in which it had been held that the defrauded shareholder must make application to have his name removed from the register of shareholders before winding up proceedings are instituted against the company, the learned judge says:

"These decisions are doubtless, in some degree, influenced by the special provisions of the English corporations act, of 1862; but the general course of reasoning therein is applicable to cases of insolvent or bankrupt corporations in this country. There is no register of stockholders in Illinois, and it is possible that the decisions in England requiring active steps by bill in chancery to have one's name removed from the register might not be applicable in their full extent here. Indeed, I am inclined to the opinion that if a company has fraudulently represented or concealed material facts, and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution and judgment, and afterwards guilty of no laches in discovering the fraud, and he thereupon repudiates the contract and offers to rescind the purchase—these facts concurring, I am inclined to the opinion that the bankruptcy of the company, subsequently happening, will not enable the assignee to insist that the purchase of stock is binding upon him."

The late Justice Miller also held precisely the same doctrine in the case of Farrar v. Walker (3 Dill. 506).

We call special attention to the two decisions of the court below

in Newbegin v. Newton National Bank, et al. (one reported in 14 U. S. C. C. A., 71, and the other in 20 U. S. C. C. A., 339). The syllabus in the first decision in the case reads as follows:

"One induced to subscribe for certificates alleged to represent an increase of the capital stock of a national bank at a time when no increase had been authorized, upon false representations of the cashier as to the bank's condition and ability to pay dividends, it being, in fact, insolvent at the time, is entitled to a judgment against the bank and its receiver for the purchase money paid.

"In an action against a national bank and its receiver to recover money paid under false representations as a subscriber for an increase of capital stock, a jury being waived, the court found facts clearly entitling plaintiff to recover. It then further found that the certificates of stock were issued on July 22, 1890; that the bank had no authority to issue such certificates; that the increase of stock was not authorized until the twenty-fourth day of September, 1890; that plaintiff was guilty of laches in not returning said certificates and demanding his money until after the bank had passed into the hands of a receiver, and in not bringing his action to recover said money sooner. The court thereupon rendered judgment for defendants. *Held*, that there was nothing in the finding sufficient to support the conclusion as to laches, and that the judgment must be reversed."

The case was again tried in the lower court and the plaintiff recovered a verdict and judgment and the case was again appealed to the court below. In the meantime the Newton National Bank had been reorganized and in fact, made the defense, depending mainly upon the proposition that the rescission or disaffirmance, on the part of the plaintiff was not made sufficiently prompt, and that the insolvency and appointment of a receiver barred the right to make it at all. A very able and interesting opinion was delivered by Justice Thayer, which we quote at length from, as follows:

"A more important question to be next considered, is whether the Circuit Court should have directed a verdict for the defendants on the ground that the insolvency of the defendant bank, occurring before the suit was filed, precluded the plaintiff from rescinding his stock subscription. It has become the settled rule in England since the decision in Oakes v. Turquand, L. R. 2 H. L. 325, 344, that a suit to rescind a stock subscription on the ground of fraud cannot be maintained by a stockholder, no matter what diligence he may have shown, after proceedings have been taken to liquidate the affairs

of the corporation, on the ground of its insolvency, inasmuch as the rights of creditors of the corporation, both as against the corporation and those who are registered shareholders, then become superior to the rights of the defrauded shareholder. Stone v. Bank, C. P. Div. 282, 307; Wright's case, 7 Ch. App. 60; Kent v. Brickmaking Co., 3 Ch. App. 493; Thomp. Corp. Sections 1439, 1441; Cook Stock & Stockh., Section 163.

"In this country there are some cases in which a stockholder's right to rescind his subscription after the intervention of proceedings in bankruptcy or after the insolvency of the corporation has been denied; but, as Mr. Thompson well remarks in his Commentaries on the Law of Corporations (Sec. 1449), it does not appear in any of the cases that the denial of the right to rescind was grounded exclusively on the fact that proceedings in bankruptcy had been instituted, or that the corporation had become insolvent. Farrar v. Walker, 3 Dill. 506, note, Fed. Cas. No. 4679; Upton v. Tribilcock, 91 U. S. 45; Ogilvie v. Insurance Co., 22 How. 381, 391; Michener v. Payson, Fed. Case No.9525; Duffield v. Ironworks 64 Mich. 293, 31 N. Y. 310; Turner v. Insurance Co., 65 Ga.649; Ruggles v. Brock, 6 Hun. 164; Hurd v. Kelly, 78 N. Y. 588; Howard v. Turner (Pa. Sup.) 26 Atl. 753. In all of these cases the evidence showed that there had either been some lack of diligence on the part of the stockholder in discovering the fraud of which he complained, or unreasonable delay in asserting his rights after the discovery of the fraud, or active participation in the management of the corporation, or that debts had been contracted by the corporation subsequent to the subscription, which either gave to corporate creditors superior equitable rights, or estopped the shareholders, as against a corporate creditor, from asserting that he was not a shareholder. The question whether a stockholder should be permitted to rescind his subscription, on the ground of fraud, after the insolvency of the company, is attended with much doubt and difficulty because of the peculiar relation which a shareholder sustains to the creditors of the company. In the case of Upton v. Englehart, 3 Dill. 496, 505, Fed. Case No. 16, 800, Judge Dillon, while discussing the subject, pointed out that the unbending English rule above referred to was influenced in a measure by the companies act (25 and 26 Vict. C. 89), which makes provision for a 'register of stockholders' to which the public have access, and that as no similar register of stockholders is ordinarily kept in the United States, the English decisions holding that the commencement of a proceeding to wind up a company, is in itself, a bar to a suit for a rescission, are not strictly applicable to the conditions which prevail here. He concluded the discussion of the question as follows:

" 'I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts, and thus drawn an

innocent person into the purchase of stock—he at the time being guilty of no want of reasonable caution and judgment, and afterwards being guilty of no laches in discovering the fraud—and he thereupon, without delay, notifies the company that he repudiates the contract, and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company, subsequently happening will not enable the assignee to insist that the purchase of stock is binding upon him.'

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made, if the subscriber has actually participated in the management of the affairs of the corporation, if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud or in taking steps to rescind when the fraud was discovered; and, above all if any considerable amount of corporate indebtedness has been created since the subscription was made which is outstanding and unpaid—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern. There is some force, doubtless, in the view which has sometimes been taken by eminent judges that when a person has been inveigled into making a stock subscription by representations that were clearly false and fraudulent, he should be entitled to rescind his subscription, even after the insolvency of the company, under the same circumstances that would entitle him to rescind a contract of a different nature; that is to say, by proof of due diligence in discovering the fraud, and of prompt action after it was discovered. Upton v. Tribilcock, 91 U. S. 55, 56; Duffield v. Ironworks (Mich.) 31 N. W. 310, 316. See also, Improvement Co. v. Merrill, 2 U. S. App. 434, 2 C. C. A. 629, and 52 Fed. 77."

The case of the Florida Land and Improvement Company v. Merrill et al., decided in the Circuit Court of Appeals, sixth circuit, and reported in the 52 Fed. Rep. p. 77, is a case very much in point. We quote the second point of the syllabus which reads as follows:

"When bank stock is fraudulently sold, and the proceeds are turned over to the bank, and a receiver is subsequently appointed, no creditor of the bank can be said to have any such interest in the proceeds as would prevent restitution and a rescission of the sale; and such appointment of a receiver does not, in itself, show that there are creditors of the bank who have prior equities."

This case again went to the Circuit Court of Appeals and is reported in 60 Fed. Rep. 17. We quote the head notes of this decision, which read as follows:

"An intending purchaser of bank stock is entitled to rely upon a statement of its president as to the bank's condition, without inquiring further.

"The receipt by a bank of the proceeds of a fraudulent sale of stock belonging to it, and the subsequent appointment of a receiver, give its creditors no such right in the proceeds as will prevent the purchaser from rescinding the sale and requiring restitution. 52 Fed. Rep. 77; 2 C. C. A. 629; 2 U. S. App. 434, reaffirmed."

We quote at length from the decision of the late Justice Jackson, in Winters v. Armstrong, *supra* (37 Fed. Rep. 509), as follows:

"The claim made by one of the counsel for the receiver, that his position as the representative of creditors is better than that of the Fidelity National Bank, and that he can enforce rights on behalf of creditors which would not exist in favor of the association, is not sound as applied to a case like the present. When the conclusion is reached that Winters, Strange and Woods are only to be regarded and treated as subscribers for valid stock which has not been, and cannot be, issued to them by the association, the receiver cannot, in behalf of either the bank, stockholders or creditors, enforce against them any right which the association could not itself have asserted. A receiver cannot enforce the payment of subscriptions to stock which the corporation could not have enforced at the time of his appointment. Cutting v. Damerel, 88 N. Y. 410. In respect to contracts of this character the receiver occupies no position superior to that of the bank for the reason that the corporate management, while in charge of its business, just as much as a receiver after his appointment, represents the interests of all persons, creditors as well as shareholders. When the corporation is insolvent the rights of creditors in respect to the corporate assets become most prominent and a receiver appointed to administer or collect such assets is regarded as more directly the representative of creditors. In a certain class of cases a receiver may assert rights which the corporation could not, thus he may disaffirm illegal and fraudulent transfers of

corporate property and may recover his funds and securities which have been misapplied. The governing officers of a corporation cannot, for example, release a stockholder or a subscriber for its stock, for his obligation to pay, to the prejudice of creditors. They cannot return to stockholders the capital stock of the corporation, which constitutes a trust fund for the benefit of creditors, to the injury of such creditors. They can make no fraudulent disposition of the corporate property for their private benefit, or for the benefit of the stockholders, leaving creditors unprovided for. These and like transactions involving the misapplication or fraudulent disposition of corporate property a receiver may disaffirm, and recover such assets for the benefit of creditors, when the corporation might not be in a position to do so. Wood v. Downer, 3 Mason 308; Curran v. Arkansas, 15 How. 304; Burke v. Smith, 16 Wall. 390; New Albany v. Burke, 11 Wall. 96, and Sawyer v. Hoag, 17 Wall. 619, afford illustrations of the cases in which receivers may assert rights which the corporation or corporate management could not enforce. But the present case involves no such principle. Subscribers to the new stock, which they have not, and cannot obtain, are in no sense the recipients of the corporate property or assets which have been fraudulently or wrongfully divested, misapplied, or disposed of to the prejudice of creditors. The rights and obligations growing out of these subscriptions rest upon contract, and in respect to such matters the receiver stands precisely in the shoes of the association and can only enforce what it could have enforced at the date of his appointment, and is subject, so far as the assets of the bank are concerned, to the same obligations as the bank would have been under had it continued in existence and never passed into the hands of the receiver. The Fidelity National Bank could not, under the facts stated, have enforced the payment of the notes executed by Woods and Strange; neither can the receiver do so. Winters could have recovered his deposit made on his subscription as against the association, and he is entitled to its allowance as a valid claim against the assets of the bank in the hands of the receiver, so far as anything disclosed by the pleadings appears."

In the case of Beale v. Dillon, decided by the Court of Appeals of Kansas, and reported in the 47 Pac. Rep. 317, the court determines the following proposition, as appears from the head notes of the case, reading as follows:

"An assignee at law of an insolvent corporation may maintain an action against a delinquent stockholder therein to collect an unpaid subscription to the capital stock of such corporation, and in such action the stockholder may interpose the defense that he was fraudulently induced to become a subscriber to the capital stock through the

false and fraudulent representations of the corporation and its officers."

This question was considered and passed upon by the United States Circuit Court of Appeals of the seventh circuit, in the case of Andrews v. National Foundry and Pipe Works, 22 C. C. A. 110, 76 Fed. Rep. 166, and the above decisions practically followed.

The position contended for was sustained by the Supreme Court of Missouri in the case of Haskell v. Worthington, 7 S. W. Rep. 481.

The same court, in the more recent case of Ramsey v. Thompson Mfg. Co. et al., 22 S. W. Rep. 719, reaffirmed this decision upon a review of all the authorities. In this last case, Justice Burgess, in delivering the opinion of the court, states the position of that court as follows:

"And while Mr. Cook says that the decided tendency of the decisions in this country is that corporate insolvency is a bar to such rescission, and the fact that the subscription was obtained by fraud and fraudulent representations, is not available as a defense in a suit against the subscriber to compel the payment of his stock, this court seems to have held otherwise in the case of Haskell v. Worthington, 94 Mo. 560, 7 S. W. Rep. 481. Brace, J., in delivering the opinion of the court in that case, which was an action by the assignee of a corporation upon a subscription to its capital stock, to recover the par value of the shares for which the defendant had subscribed, held that, as the assignee stood in the shoes of the corporation, it was a good defense to show that the corporation had entered into actual business with less capital stock subscribed than the amount stated in its articles of incorporation, the defendant not having by his conduct estopped himself from setting up the defense; that the assignee occupied no better position than the corporation did."

See also:

Whitney et al., v. Butler, 118 U. S., 655.

We quote at length from the opinion of Chief Justice Campbell in the case of Duffield v. E. G. Barnum Iron Works Co., 64 Mich., 293, as follows:

"The question seems to be narrowed to the inquiry whether plaintiff is deprived of his remedy by the subsequent assignment. If there was no fault in not discovering the wrong, and if the

suit was brought before any opposing claims had obtained a preference, it cannot be said there was any waiver, and it is difficult to see anything which can be treated as an estoppel. There is no foundation in reason or in law, so far as we can discover, for holding that he is debarred of complaint because others have also been subsequently defrauded. A creditor who becomes such by fraud in obtaining his money for one purpose, has as distinct an equity as those who were afterwards defrauded or persuaded into giving credit for goods or supplies. Under our statutes stockholders are not personally liable to contribute beyond what will pay up their stock, and creditors cannot enforce any rights, under the assignment, against paid-up stock at all. But the suit of plaintiff is based on the claim that he never was properly to be considered a stockholder by the company, and, under this assignment, if anything, had remained unpaid on his shares, it would have been as a balance collectible by the company as his subscription, and not a debt due to creditors themselves as such. In England the winding up process is mainly to enforce contribution from shareholders, upon the theory that credit is given them as such. But even there it is very clearly held that the distinction taken between defrauded stockholders who sue before winding-up proceedings, and those who delay until after, does not depend upon any principle of estoppel in favor of creditors acting in faith of their membership, but upon the legal position which they are placed in by the winding-up proceedings whereby all persons registered as shareholders become, by operation of law, bound to contribute, because those proceedings themselves fixed their status.

"This is very clearly explained in Stone v. City and County Bank, Ltd., 3 C. P., Div. 282; and in that same case, where the authorities are reviewed and explained, it was strongly intimated that while after the proceedings begun for winding up, the plaintiffs could not avoid being treated as shareholders, they might have sued in that capacity for the damages incurred by the fraud of the company, which induced them to buy stock, and been treated as creditors for the damages.

"In Smith's case, before cited, it was expressly decided that creditors had no better claim than defrauded shareholders to sue for redress, and could not be preferred to them under circumstances which did not fix a legal priority. Lord Cairns there remarks: 'It is one of the risks, and it ought to be known that it is one of the risks which creditors are liable to in dealing with limited companies, that it may turn out that some person whose name has been entered as a shareholder in the list has a right to have his name taken off the list if he can prove that it has been fradulently inserted there, and if he comes with promptitude to have the fraud redressed.' In other words, it is considered that, unless personally in the wrong in some way, all creditors stand on an equal footing for redress until, by some process, which the law has

authorized to have that effect, they are placed on a different footing; and, if this is so, any remedy which is seasonably resorted to must be sustained.

"It is the settled law of this state that a creditor who has obtained security by attachment or otherwise before a general assignment cannot be deprived of his preference by that or any other subsequent action of his debtor. If he was defrauded, it is equitable that he should have a remedy; and if he has not contributed himself to mislead other creditors, there is no legal provision in this state to prevent him from seeking it in the same way as if no other creditors existed. None of our corporation statutes create any such difference in ordinary cases. How far it is done in the specific cases of personal liability existing in some instances by constitutional or statutory provisions, we need not inquire. The present case is no such case, and the assignee, or the receiver who represents him, only holds the property and rights of the corporation, and not rights which the company itself could not enforce, except perhaps where property of the company has been fraudulently transferred. In this respect it varies considerably from the English winding-up acts. But as the suit here preceded the assignment, it would have been in season even there.

"In our opinion the plaintiff had a plain right to maintain his action based on the fraud complained of, and the court below erred in holding otherwise. The judgment must be reversed and a new trial ordered. If the funds representing the attached property and reserved for this case are sufficient, without impairing the claim in controversy, the costs will be paid out of that. If not, they will be paid like other legal charges by the receiver."

In the case of Robinson v. Dickey et al. (14 Tex. Civ. App. 70), this question is passed upon as follows:

"1. Plaintiff, induced by false representations made to him by the officers of a bank, that the bank was solvent, and that the shares of stock which were to be delivered to him as part consideration were worth their face value, contracted to convey certain lots to the bank, on its agreement to erect a building thereon. The bank never completed the contract, further than to deliver the stock, and subsequently went into the hands of a receiver. *Held*, that plaintiff was entitled to a rescission of the entire contract on tender of the stock itself to the receiver."

See also recent decision of the Court of Chancery of New Jersey in Tierney v. Parker, 44 Atl. R., 151.

We call attention to the recent decision of the Circuit Court of the 9th Circuit in the case of Stufflebeam v. De Lashmutt, 101 Fed., 367.

Also to the very able and clear review of the authorities upon this question made by Chief Justice Robinson, in the case of Savage v. Bartlett, etc., 78 Md., 561.

IV.

The somewhat recent decision of the court below (by a divided court) in the case of Scott v. Latimer (89 Fed. Rep., 843), changed the rule in the Eighth Circuit, and practically decided (in advance of their reaching that court) the cases at bar.

As we read the decision in Scott v. Latimer, it is mainly placed upon the ground:

That the liability of a stockholder, is not contractual, but entirely statutory, and that although the contract, by which the stock is acquired, be induced by fraud, the rescission of such contract, cannot release the liability imposed by the statute (regardless, we should say, whether a receiver had been appointed or not). This, fully appears, from the 2nd, and 3rd, points of the syllabi, in the case, but more clearly, from the following extracts taken from the opinion of the majority of the court:

"If it be true that the subscription to the stock was obtained by false representations touching the pecuniary condition of the bank, that did not make the contract absolutely void but only voidable at the option of the subscriber; and, therefore, when the bank was put in liquidation, the corporate creditors had the right to enforce the statutory liability against all persons who were then stockholders. * * *

"Suits of this character, strictly speaking, are not actions based upon the contract of subscription existing between the corporation and the stockholder. * * * The right of the creditors to enforce the statutory liability against shareholders in a national bank is not dependent upon the terms of the stock subscription contract. * * *

"The liability sought to be enforced in this case is not one created by contract existing between the corporation and its stockholders, but is one created by statute in favor of creditors, and not in favor of the corporation. And it is a liability which cannot be affected, discharged, or released by any action taken by the corporation, or by the combined action or agreement of the corporation and its stockholders. * * *

"It is thus made clear that the liability sought to be enforced in this case is not dependent upon the terms, or in fact upon the

existence, of a contract of subscription to the capital stock of the bank, but it is a liability imposed by statute in favor of creditors, and it is a liability, as already said, which cannot be modified or released by any action on the part of the corporation, or of the corporation and its stockholders. It is created for the benefit of the creditors, and no action on the part of the bank can estop the creditors from enforcing their rights in this particular. * * *

"As already said, this suit is not based upon the contract of subscription between the bank and the plaintiff in error, and is not, therefore, an action wherein the issue can be made as to the voidability of that contract, as between the bank and the shareholders. The suit is on behalf of the creditors to enforce the statutory liability, in which the bank has no interest; a liability which was not created by any contract to which the bank was a party; a liability which it is beyond the power of the bank to modify, release, or discharge: and a liability which, if once called into existence by the act of one assuming the position of a stockholder, cannot be defeated, save by the creditors, or some one acting in their behalf."

That the theory of the majority of the court in this case, that the contract of subscription or purchase has nothing to do with this liability is untenable, we have already seen.

We call attention of the court to the very vigorous, dissenting opinion of Justice Sanborn in this case, found on pages 856 to 865, quoting from it, as follows:

"It is held in those cases (the cases cited and relied upon by the majority of the court) that those who knowingly permit themselves in various ways to appear to be stockholders, those who were stockholders, but presented the false appearance that they were not, and those who fraudulently transferred their stock to irresponsible parties to escape liability, were estopped from defeating creditors of the corporation in their attempts to hold them as such. It is, indeed, repeatedly stated in those cases that the property of an insolvent corporation and the liability of the stockholder are a trust fund pledged for the benefit of the creditors; and that is equally true of every insolvent person. But in none of these cases —in no case cited by the court or counsel—was the holder of the stock duped into his place and liability by undiscoverable fraud. In none of them did any court hold that money obtained from, or liability imposed upon, a stockholder by fraud which he could not discover are a trust fund held for the benefit of the creditors of the corporation which perpetrated the fraud. Can a debtor by fraud confer upon his creditors any greater right to the property or liability of his victim than he gets himself? * * *

Why is not the right of one who is induced by fraudulent representations of a bank to buy its stock to a rescission of that sale

and a release of the liability it imposes superior to the claims of its creditors, or its receiver to enforce them? * * *

In all the cases cited by the majority either a valid contract of subscription of purchase existed, or the stockholders were estopped from rescinding a voidable contract, because they had acted as such after they knew, or might have known, the facts upon which they relied to avoid it. In the case at bar the contract was induced by fraud, and it was concealed by fraud. In this case no estoppel against the plaintiff in error can be sustained, because he did not know and could not learn the facts, and no duty to speak or act rested upon him until he acquired that knowledge, or means of knowledge.

The bank induced the plaintiff in error to play the part of a stockholder, and thereby to lose all the money he deposited with it, and to run the risk of liability to lose as much more by the same scheme of false representations of its solvency, of its flourishing condition, and of its increase of stock, which doubtless induced the creditor to take the bank's promise of repayment for the money he deposited with it. In such a case, why should not the right of the purchaser of stock who suffers the greater wrong be equal to that of the creditor who suffers less? Neither of them was aware of the fraud, neither of them did or could discover it until both were injured. Neither of them knowingly or negligently deceived the other, and, in my opinion, neither of them is entitled to estop the other from undoing the fraud from which they suffer."

See also, McClenathan v. I. L. & I. Co., (Va.), 30, S. E. R., 450.

V.

The decisions of the courts in England followed by the court below do not militate against the proposition stated. The leading case of Oakes v. Turquand (L. R. 2. H. L., 325), and the subsequent cases, are each and all based upon the provisions of the English Act of 1862, entitled, "An Act for the Incorporation, Regulation and Winding Up of Trading Companies and Other Associations" (Ch. 89, 25-26, Vict). See appendix, where some of the provisions are set out. This Act contains some 212 sections, collecting into one code the provisions which were thenceforth to be applicable to incorporations of the character provided for in the Act. By this Act, a public officer was appointed for keeping a register of, among other things, the name of the projected company; a statement of the nature of its intended business; the amount of its capital; the names and addresses of

every subscriber, with the number of shares taken by him and the amount paid on each share. It further provides that the register shall be open to inspection, not only of the members, but all other persons, and that any person, whose name has been wrongfully registered may apply to any Superior Court of law for equity for a rectification of the register. In the event of the company being wound up the Act provides that every member shall be liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities.

Section 38 of the Act provides that shareholders within the preceding year, who have disposed of their shares, and are not registered at the time of the commencement of the winding up proceedings, shall, under certain circumstances and conditions, be liable to the payment of the debts, upon the winding-up of the corporation.

Shortly prior to the decision in Oakes v. Turquand, the House of Lords in the case of Railway Company v. Kisch (L. R. 2, H. L. 99), determined that one whose subscription to capital stock in an association was induced by fraud, had the right, upon the discovery of the fraud, to rescind his contract of purchase to the same extent as an individual would have the right in a contract between himself and another individual to rescind such contract for fraud.

Following this decision, came the case of Oakes v. Turquand, which we do not believe ever should have been construed as determining, under the Act, that the commencement of winding-up proceedings, against a corporation, cuts off the right of a shareholder, under any, and all circumstances, to rescind his contract, of subscription, and have his name removed from the register. This belief is strengthened by the head-notes to the case, a portion of which we quote as follows:

"Where a memorandum of association (which was registered) differed from the prospectus on which it professed to be founded, and on which as setting forth the true objects of the association, A, had become a shareholder, though he, on discovering the difference, might have repudiated his shares, he could not after the fail-

ure of the company, relieve himself from liability to contribute to the debts of the association, on the ground that he had been ignorant of something which, with proper diligence, he might have known."

"It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association. He must take the consequences of the negligence." * * * "A, applied, on the face of statements in the prospectus, for shares in a limited liability company. They were allotted. His name was put on the register of shareholders. At the end of nine months the company failed. It was ordered to be wound up. A, then applied to have his name removed from the list of contributories;

"*Held*, affirming the decision of Malins, V. C., that it was properly placed there."

Conceding, however, for the sake of the argument, that this case, is as broad, as it has been construed to be, by some courts, and some text-writers, yet, it ought not to be an authority, in a case like the one at bar, as there are many notable distinctions, between the English Act, and the Acts of Congress, concerning national banks, some of which we call the court's attention to as follows:

There is no requirement in the national banking acts, that one, having a right from any cause, to have his name removed from the registered list of stockholders shall proceed, in a court, to compel the taking of his name, from the register. It must be conceded, that a shareholder, in a national bank, induced to become such by the fraud of the bank, may, while it is a going concern, make a common law rescission, of his contract of purchase, and relieve himself from all liability.

Whitney v. Butler, *supra*.

Neither is there any provision for a public registry of names of the shareholders, in any national bank, which may be examined, by the public at large, or by any one, who intends becoming a creditor of such bank. The provisions of Sec. 5210, R. S., after providing for the keeping of a list of the shareholders, with the names and residences, provides:

"Such list shall be subject to the inspection of all the shareholders and creditors of the association and the officers authorized

to assess taxes under state authority, during the business hours of each day in which business may be legally transacted. A copy of such list on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the comptroller of the currency."

As we have seen, there is no act of Congress which places a receiver appointed for a national bank, in any better position, as to the assets of the bank, than would the assignee of an individual insolvent for the benefit of creditors, be placed in, by the rules of the common law.

VI.

While some text-writers, and some courts, cite the decision, of this court, in Upton v. Tribilcock (91 U. S. 45), as a decision, supporting the supposed doctrine of Oakes v. Turquand, a careful examination of the opinion in the case will lead to the conclusion, that it is not an authority sustaining such view. The action in that case, was brought by the assignee of an insolvent company, to recover a stock subscription, and the defense was, that the subscription, had been procured by the false representations of the agent of the company. This court held, that these representations were, if anything, a misrepresentation as to the law, and were not misrepresentations as to the facts, and hence not the basis of a right to a rescission of the contract for fraud; but that if the representations, amounted to such fraud, as would give to the defendant, in that case, the right of rescission, he had been guilty of *laches* in ascertaining the truth, or falsity of the representations, and especially guilty of *laches* in repudiating the contract of subscription. The right of the defendant in that case to repudiate the contract of subscription on the ground of fraud, apart from the question of *laches* on his part, even after the assignment, and the right to repudiate it, without a proceeding against the company to remove his name from the books of the company, is distinctly recognized by this court in that case, and there is no intimation by the court, in its opinion that it was too late after the assignment, to rescind the contract of subscription. It seems to have been conceded, by the court,

that such a rescission could be made, had the defendant in that case, grounds for making the same, and had exercised the right promptly, without any *laches*.

The few other cases in other jurisdictions supporting the English doctrine do so solely on authority of the English cases, and upon the erroneous proposition that the liability is purely statutory and not contractual.

THIRD POINT.

The court below erred in affirming the ruling of the Circuit Court sustaining each of the demurrers to each of the cross-petitions.

I.

Each of these answers included in addition to the defenses referred to, a cross-petition, against the receiver (based upon the facts stated in each of the separate defenses), to recover a judgment for the amount paid to the bank for this stock asking that such judgment, when recovered, be paid by the receiver out of the funds in his hands, pro rata. The right to set up these counter-claims, in the answers, is given by sections 94 and 95 of the Kansas code stating what an answer can contain.

Section 94 * * *

"A statement of any new matter constituting a defense, counter-claim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition."

Section 95 reads as follows:

"The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. * * *"

The facts stated in this cross-petition, under the decisions of the Supreme Court of Kansas creates a counter-claim that can be used as a set-off.

In the case of Fanston v. Linsley, 20 Kas. 235, the second and third points of the syllabus, are as follows:

"2. *When tort may be waived; benefit to wrongdoer.* Whenever one person commits a wrong or tort against the estate of another, with the intention of benefitting his own estate, the law will, at the election of the party injured, *imply* or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer. And when the injured party elects to waive the tort, his cause of action may be used as a set-off.

"3. *When a tort may not be waived; naked trespass.* Where one person commits a wrong or tort against another, without any intention of benefiting his own estate, and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrongdoer to pay for the resulting damages; and such cause of action cannot be used as a set-off."

This decision has been repeatedly affirmed.

St. L. F. S. & W. R. R. Co. v. Chenault et al., 36 Kas. 51;

Smith v. McCarthy, 39 Kas. 308;

Frankhouser v. Neally, 54 Kas. 744;

In Smith v. McCarthy, *supra*, the first and second points of the syllabus read as follows:

"Where a person takes and sells the property of another, the owner may elect to waive the tort and sue upon the implied contract for the value of the same; and whether he has so elected, and the nature of the action brought, are to be determined by the court from the pleadings."

"In determining the effect of pleadings, they should be liberally construed with a view to substantial justice between the parties; and the pleadings herein are examined and are held to state a cause of action *ex contractu*."

In this case, it was held that the following allegations stated a cause of action on an implied promise:

"The plaintiff avers that on the first day of October, 1885, one Jerry McCarthy, being at that time indebted to this plaintiff in the sum of nine hundred and twenty-five dollars, made, executed and

delivered to the plaintiff his certain chattel mortgage in writing, a copy of which, with all the indorsements thereon, is attached hereto, marked 'Exhibit A,' and made a part of this petition; that said chattel mortgage was forthwith, on the delivery of the same, deposited by the plaintiff in the office of the register of deeds of Atchison county, Kansas, where said chattel property was situated and the mortgagor resided; that on or about the 28th day of October, 1885, and while said chattel mortgage was in full force and effect, of record, and unpaid, the defendant, by and through her duly authorized and appointed agent, Ryan Smith, did take the fifty head of hogs mentioned and described in 'Exhibit A,' from the possession of the plaintiff mortgagor, Jerry McCarthy, without his consent, and without the consent of this plaintiff, and did convert the same to her own use and benefit; that the value of said fifty hogs was at said time, and now is, the sum of seven dollars a head, all of said hogs being of the value of three hundred and fifty dollars; that the plaintiff has duly demanded from the defendant the said hogs and all of them, which demand was refused; and that he also demanded the value of said hogs, to wit, the sum of $350, of and from defendant, which demand has been refused; that the plaintiff has a special ownership in and to said hogs to the amount of $925, being the amount of the chattel mortgage hereto attached. Wherefore, the plaintiff prays judgment against defendant for three hundred and fifty dollars, and costs of this action."

II.

We have difficulty in understanding the position of the court below with reference to these cross-petitions (Pr. tr., p. 31, term No. 180). That each of the plaintiffs in error had a claim good as against the bank, as for money had and received, must be conceded.

> Central Transportation Co. v. Pullman's Palace Car Co., 171 U. S., 138.

That such a claim was entitled to be established as a claim which was entitled to participation in the distribution of the assets must also be conceded.

> Chemical National Bank of Chicago v. Hartford Deposit Co., 161 U. S. 1.

There being claims against the bank, the plaintiffs in error could, if they chose, bring suit directly against the receiver to establish the same as claims entitled to share in all distribution.

Southern Exp. Co. v. Western N. C. R. R. Co., 99 U. S., 191;

Denton v. Baker (U. S. C. C. A., 9th Circuit), 79 Fed., 189.

Speckart et al. v. German National Bank et al., 85 Fed. 12.

While it is clear that these claims grew out of an implied contract, yet if they grew out of a tort, there is no reason existing, why they should not be paid pro rata with all other claims, or be used as a set-off to the extent that they are entitled to participate in the assets in an action of this character. While, of course, the establishment of these claims could only determine their right to receive the pro rata share in the distribution, yet to that extent they should be allowed as a set-off.

Scammon v. Kimball, 92 U. S., 362;

Carr v. Hamilton, 129 U. S., 252;

Scott v. Armstrong, 146 U. S., 499, *supra;* and cases cited;

Central Appalachian Co., et al., v. Buchanan (C. C. A. 6 Cir.) 90 Fed. Rep., 454, and cases cited.

III.

There is no conceivable view that can be taken of the facts stated in the cross-complaints which would not entitle the plaintiffs in error to a judgment against the receiver for the amount of each of their several claims, or the right to set the amount of such claims off *pro tanto* against any claim of the receiver, under the Kansas statute, *supra*.

It must be conceded that under the provisions of section 2334 revised statutes, and the decisions of this court (collated in Denton v. Baker, *supra*), that Hood, and Lantry, each, had claims against the Missouri National Bank at the time it was placed in the hands of the receiver, growing out of the admitted fraud of the bank in selling the stock it sold to them, whether they severally were, and are, stockholders, so far as the receiver is concerned, or not; or whether they be regarded as people who having been stockholders, ceased being such from the time of the attempted rescission of

their contract of purchase, or whether they be regarded as persons who purchased over issued stock, and, therefore, never were stockholders. If they never acquired any stock, owing to the fact that the transaction was *ultra vires,* or if they rescinded the contract of purchase of the stock rightfully, they each had a several claim against the bank for the amount of money which they paid for the stock, which can be enforced in this action as a counter-claim if such claims grew out of the same transaction as did the contract which the receiver is trying to enforce against each of them. On the other hand, if the receiver has the right to recover from them the assessments ordered by the comptroller, either upon the theory that they are estopped as to him, to deny the fact that they are stockholders, or that they have waived the right to deny that they are stockholders, by reason of their laches, or that after the insolvency of the bank and the appointment of the receiver it is too late, as to the receiver, to rescind the contract of purchase, or deny the fact of their being stockholders for any reason, such right of recovery would not, in any wise, interfere with the right of action on behalf of each of the plaintiffs in error against the bank on account of its fraud, as this right existed (whether plaintiffs in error knew it or not) at the time the bank was placed in the hands of the receiver. Plaintiffs in error have the right to establish these claims against the bank either by a judgment of the court, or by the allowance of the receiver, under the provisions of section 2334, revised statutes [see Denton v. Baker, *supra,* and authorities there cited], and these claims can, in such case, be used as a set-off if it be held that they do not grow out of the same transaction involved in the matters set out in the petition.

The receiver, if he can recover at all, will recover because of the contract made between the plaintiffs in error and the bank for the benefit of the creditors of the bank, by the contract of purchase of this stock from the bank. If the plaintiffs in error have the several rights to recover against the bank it is on account of their claims that grew out of the transaction of this purchase, upon which the

right of the receiver is based, and consequently, it falls within the provisions of the Kansas code relative to counter-claims.

For the convenience of the court, we have placed in the appendix copies of those portions of the National Bank Acts applicable to the case, and also some of the sections of the English Act of 25-26 Victoria, referred to.

All of which we respectfully submit.

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APPENDIX.

The following are all the sections of the Revised Statutes in reference to national banks having any application to the case under consideration:

"Sec. 5139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

"Sec. 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

"Sec. 5234. On becoming satisfied, as specified in section-fifty-two hundred and twenty-six and fifty-two hundred and twentys seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect

all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

"Sec. 5235. The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

"Sec. 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Chapter 89 of Statutes 25–26, Victoria, enacted August 7, 1862, entitled "An Act for the incorporation, regulation and winding-up of trading companies and other associations," provided for the incorporation of trading associations, etc. The 18th, 23rd, 35th, 38th, 74th and 82d sections of the Act are, for the convenience of the court, here copied and set out:

18. Upon the registration of the Memorandum of Association, and of the Articles of Association in cases where articles of association are required by this Act, or by the desire of the parties to be registered, the registrar shall certify, under his hand that the company is incorporated, and in the case of a limited company, that the company is limited. The subscribers of the Memorandum of Association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an

incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up, as is hereinafter mentioned. A certificate of the incorporation of any company given by the Registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with.

23. The subscribers of the Memorandum of Association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company.

35. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in *England* or *Ireland*, by motion in any of Her Majesty's Superior Courts of Law or Equity, or by application to a Judge sitting in Chambers, or to the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in *Scotland* by summary petition to the court of Session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal,

in the manner directed by "The Common Law Procedure Act, 1854," shall lie.

38. In the event of a company formed under this Act being wound-up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say):

(1) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up.

(2) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.

(3) No past member shall be liable to contribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act.

(4) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

(5) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the Memorandum of Association.

(6) Nothing in this Act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract.

(7) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves.

74. The term "Contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up. It shall also in all proceed-

ings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.

82. Any application to the court for the winding-up of a company under this Act shall be by petition; it may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favor of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.

Supreme Court of the United States.

No. 148.—October Term, 1900.

George H. Scott, Plaintiff in Error, vs. Parry L. Deweese (substituted for W. A. Latimer), Receiver of the First National Bank of Sedalia, Missouri.	In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[April 15th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

This case went off in the Circuit Court upon a motion for a judgment in favor of the plaintiff upon the pleadings. The motion was sustained and judgment was entered in accordance with the prayer of the petition. That judgment was affirmed in the Circuit Court of Appeals, Judge Sanborn dissenting, 89 *Fed. Rep.* 843, 856; 60 *U. S. App.* 720, 743. The case is here upon writ of error sued out by the defendant Scott.

The case made by the petition is substantially as follows:

The First National Bank of Sedalia, Missouri, was organized on the 30th of October 1865 with a capital stock of $100,000 and thereafter, until the 24th day of October 1885, continued to do a banking business.

On the day last named the bank, pursuant to the provisions of the act of Congress approved July 12th 1882, 22 *Stat.* 162, *c.* 290, extended the period of its succession for a term of twenty years from and after the 30th of October 1885; and on the 24th of October 1885 the Comptroller of the Currency issued his certificate stating that the bank had complied with the provisions of the act of Congress in thus extending the period of its existence, and was authorized to have succession until the close of business on the 30th of October 1905.

On the 6th of September 1890 the bank increased its capital stock in the sum of $150,000; and on the 17th of January 1891 the Comptroller of the Currency certified that it had increased its stock to the above extent in accordance with the provisions of the act of May 1st 1886, 24 *Stat.* 18, *c.* 73, and that such increase was approved; also, that the increase had been duly paid in as part of the capital stock of the company.

The bank continued to do a banking business upon the basis of a capital stock of $250,000 until the 4th day of May 1894, on which day it became insolvent, closed its doors, and ceased to do business.

On the 10th of May 1894 the original plaintiff, W. A. Latimer, was duly appointed receiver of the bank by the Comptroller of the Currency under the laws relating to national banking associations. The defendant in error Deweese was after that date substituted in his place as receiver.

In winding up and settling the affairs of the bank the Comptroller of the Currency determined that it was necessary to enforce the individual liability of stockholders and to collect from them an amount equal to 75 per cent. of their stock at par value; and on the 13th day of April 1895 that officer made an assessment and requisition upon shareholders for the sum of $187,500, to be paid by them ratably on or before the 15th day of May 1895, and made demand upon the defendant Scott for $75 upon every share of the capital stock of the bank held or owned by him at the time of the failure of the bank as above stated, payable on or before the 15th day of May 1895. The receiver was directed to enforce against shareholders the payment of the amounts assessed against them.

At the time of the failure and suspension of the bank the defendant Scott was the owner and holder of fifty shares of its capital stock of the par value of $100 each. The amount ratably due by him as such shareholder under the above assessment was $3,750.

On the 17th day of April 1895 the receiver of the bank notified the defendant of the assessment and requisition and demanded payment of the same; but he did not pay that sum or any part thereof. Hence this action.

Judgment was asked for the sum of $3,750, with interest from May 15th 1895, as well as for costs of suit.

The defendant in his answer admitted the organization of the bank and the extension of the period of its incorporation as alleged; also that the bank continued to do a banking business as set out in the petition, and that it had become insolvent and closed its doors. He also admitted the appointment and qualification of the receiver and the allegations of the petition as to the order of the Comptroller of the Currency.

Further answering, he alleged, that on September 6th 1890 the bank, by a vote of the owners of two-thirds of its capital stock, voted to increase that stock in the sum of $150,000; that it notified the Comptroller that the whole amount of such increase had been paid in; that on January 17th 1891 that officer—then knowing that more than the entire capital of the bank was loaned, directly and indirectly, to its president, and that the amount so loaned had been steadily increased for several years up to the date just named by adding the interest which was not paid to the notes evidencing the loans or the renewals thereof, and who based his action wholly upon the notification from the bank—issued a certificate stating that the amount of the increase of capital was $150,000, that the same was paid in, and that such increase was approved; that thereafter, until May 24th 1894, the bank continued to do business with a pretended capital of $250,000;

That "in September 1890 the officers of said bank informed and represented to defendant as follows: That said bank contemplated increasing its capital stock from one hundred thousand dollars to two hundred and fifty thousand dollars; that said intended increase of capital was made desirable on account of the increasing business of said bank; that said bank was in a flourishing condition and earning large dividends upon its capital stock, and then had a surplus of fifty thousand dollars over and above its capital stock and all liabilities; that from said surplus such dividends would be declared as would make each of the two thousand five hundred shares of stock worth the sum of one hundred and eight dollars;"

That relying upon such representations the defendant—never having held or owned any stock in the bank—subscribed for fifty shares of the proposed increase of $150,000, and in October 1890 deposited in the bank the sum of $5,400;

That it was the understanding between the defendant and the bank that that sum was to be held by it and applied in payment of defendant's subscription for fifty shares, when all of the proposed increase was subscribed and the money therefor paid into the bank, "and the issues of the shares of said increase could be legally made;"

That the bank gave to the defendant a receipt for said sum of $5,400, and about October 25th 1890 delivered to him a certificate for fifty shares of "its said pretended increase of capital;" and,

That the "bank then, falsely and fraudulently and with intent to deceive defendant, represented to defendant that the said increase of capital had been lawfully made, and that the full amount thereof had been subscribed for and paid in in full, and defendant, deceived by said representations, and relying thereon, accepted and retained said certificate, and that defendant held and claimed as owner said certificate thereafter and until the closing of said bank, and in the years 1891 and 1892 received and retained alleged dividends aggregating eighteen per cent. of the par value of said certificate; that said alleged dividends were paid out of the money paid as aforesaid by defendant to said bank."

The defendant further alleged that in September 1890 and for many months prior thereto and afterwards, the bank was in fact wholly insolvent, had no surplus whatever, and at the time of the increase of the stock all of its capital had been lost—its liabilities irrespective of its capital stock and alleged surplus exceeding its assets—and it was earning no dividends upon its capital;

That said pretended increase of stock was never of any value or validity whatever; that only about *two-thirds of the increased stock was ever paid;* that the officers of the bank made false entries in its books and records for the purpose of showing an apparent surplus, and declaring a dividend to themselves therefrom, turning the dividends into the bank in pretended payment for a large part of the increased stock;

That the whole transaction was a sham for the purpose of bolstering up an insolvent institution by obtaining large sums of money from the subscribers for the increased stock, and for the further purpose of "watering" its capital stock and permitting its officers to appropriate to themselves without paying anything therefor, a large part of such pretended increase, of all of which defendant had no knowledge whatever until long after the bank had closed its doors on May 4th 1894, nor had defendant any information whatever that could in any way have created a suspicion thereof;

That the books and records of the bank during all the time after October 25th 1890 had shown, and it had been made by them to appear, that all of the pretended increase of capital was paid in; and that from a time prior to the last-named date until the bank closed its books and records were systematically, skilfully and cunningly falsified by its officers, and so kept that the defendant could not by the utmost diligence have ascertained the true condition of the bank; and,

That as soon as he discovered that the increased stock was not fully paid in, defendant disclaimed and denied that he was or ever had been a stockholder of the bank.

Such being the case made by the pleadings, we are to inquire whether there was error in giving judgment against the defendent.

By section 5151 of the Revised Statutes, "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Within the meaning of that section, was the defendant, in view of the facts stated in the pleadings, to be deemed a shareholder of the bank when it suspended and was put into the hands of a receiver?

The defendant admits in his answer that he held, and for three years and more previous to that date had held, a certificate for fifty shares of the bank's stock, and exercised the rights of a shareholder by receiving dividends for the years 1891 and 1892 aggregating eighteen per cent. of the par value of the stock standing in his name on the book of the association. He thus enjoyed the privileges of a shareholder.

The defendant, however, contends that although he may have exercised the rights of a shareholder in holding a certificate of shares and in receiving and retaining dividends, he was not a shareholder within the meaning of section 5151 so as to become individually liable, to the extent prescribed by that section, for the contracts, debts and engagements of the bank.

That position is supposed to be justified by section 5142 of the Revised Statutes declaring that "any association formed under this Title may, by

its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association." That section was modified, in some respects, by the act of May 1st 1886, *c.* 73, which provided "that any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided." Under this last statute the bank proceeded when by the vote of two-thirds of its shareholders it determined to increase its stock by $150,000. 24 *Stat.* 18, § 1.

The defendant lays great stress on the words in section 5142, "no increase of capital shall be valid until the whole amount of such increase is paid in," and until the Comptroller shall certify that the amount of the proposed increase "has been duly paid in as part of the capital of such association." But does it follow that one who claimed to be a shareholder in respect of an increase of the bank's capital, and who was recognized as such by the bank, particularly if he held a formal certificate stating that he was a shareholder, can escape liability, under section 5151, by simply proving—after the bank has suspended and has been placed into the hands of a receiver—that the *whole* amount of the proposed increase was not in fact "paid in" as required by section 5142, although the contrary was certified by the Comptroller upon the bank's report to that officer? We think not.

The literal construction insisted upon by the defendant might produce results which we cannot suppose were ever contemplated by Congress. Referring to that construction the court below well said: "If this contention is well founded, then, as already said, it follows that if all the shares but one had been subscribed and paid for, nevertheless the holders of the certificates for the full-paid shares could not be heard to assert that they were the owners of valid shares, which would be a most unjust result. If this is the true meaning of the statute, it is made possible for parties in control of a national bank, with the approval of the Comptroller, to authorize the increase of the capital stock, to obtain subscription and payment in full

for all the shares but one or two, and then, if that be desirable, to deny to the holders of these full-paid certificates, any participation in the control of the bank, or in case the bank becomes insolvent, to shield these holders of certificates from liability to creditors. Certainly a construction of the statute having such results should not be adopted unless the statute as a whole imperatively demands it."

The primary object of the provision that "no increase of capital shall be valid until the whole amount of such increase is paid in" was to prevent the "watering" of stock, that is, prevent banking business being done upon the basis of an increased capital which did not in fact exist. If this prohibition be disregarded by a national bank, the conduct of its business could no doubt be controlled by the representatives of the Government so far as might be necessary to compel obedience to the law. *R. S.* § 5205. But the statute does not, in terms, make *void* a subscription or certificate of stock based upon increased capital stock actually paid in, simply because the whole amount of any proposed or authorized increase has not in fact been paid into the bank. Certainly, the statute should not be so applied in behalf of a person sought to be made liable as a shareholder, when, as, in the present case, he held, at the time the bank suspended and was put into the hands of a receiver, a certificate of the shares subscribed for by him; enjoyed, by receiving and retaining dividends, the rights of a shareholder; and appeared as a shareholder upon the books of the bank which were open to inspection, as of right, by creditors. *R. S.* § 5210. As between the bank and the defendant, the latter having paid the amount of his subscription for shares in the proposed increase of capital was entitled to all the rights of a shareholder, and therefore, as between himself and creditors of the bank, became a shareholder to the extent of the stock subscribed and paid for by him. That the bank, after obtaining authority to increase its capital, issued certificates of stock without the knowledge or approval of the Comptroller and proceeded to do business upon the basis of such increase before the whole amount of the proposed increase of capital had been paid in, was a matter between it and the Government under whose laws it was organized, and did not render void subscriptions or certificates of stock based upon capital actually paid in, nor have the effect to relieve a shareholder, who became such by paying into the bank the amount subscribed by him, from the individual liability imposed by section 5151.

In *National Bank* v. *Matthews*, 98 *U. S.* 621, 629, it appeared that a national bank had made a loan of money, the repayment of which by the borrower was in part secured by a deed of trust on real estate. The borrower insisted that the taking of the deed of trust as security was in violation of the act of Congress. This court conceded that the statute by clear implication forbade a national bank from making a loan on real estate

security, but held that the violation of the statute by the bank was a matter of which the borrower could not complain, saying: "We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive act shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the Government." The doctrine of the *Matthews* case has been often reaffirmed. *Whitney* v. *Wyman*, 101 *U. S.* 392, 397; *Jones* v. *Guaranty and Indemity Co.*, 101 *U. S.* 622, 628; *Fritts* v. *Palmer*, 132 *U. S.* 282, 291; *Logan County Nat. Bank* v. *Townsend*, 139 *U. S.* 67, 76; *Thompson* v. *St. Nicholas Nat. Bank*, 146 *U. S.* 240, 251.

By section 5201 of the Revised Statutes it is provided that "no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association." "While this section," this court said in *National Bank of Xenia* v. *Stewart*, 107 *U. S.* 676, 677, "in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by any one except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can, then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves."

These principles are in our judgment applicable to the case before us.

The defendant alleged that he subscribed for the fifty shares of the proposed increase of the bank's capital and deposited in the bank the amount necessary to pay for the stock, upon an understanding with the bank that the amount so deposited should be applied in payment of his subscription when all of the proposed increase of capital had been subscribed for and paid in, so that shares based upon such increase could be legally issued.

But this does not present the whole case. The defendant, having paid in the amount subscribed, subsequently accepted a certificate for the shares subscribed for by him, knowing, as he must be conclusively presumed to have known, that the money paid in by him was the basis of such certificate. He assumed the position, and claimed and exercised the rights, of a shareholder. He drew money from the bank as dividends upon his stock. No understanding which the defendant may have had with the officers of the bank prior to his completed subscription of stock could, under the circumstances disclosed, relieve him from the liability attaching to him as a shareholder, after he had, in the most unequivocal manner, claimed and was accorded by the bank the rights of a shareholder. It may be—although upon this question we express no opinion—that the defendant, by proper proceedings instituted in good faith and in due time before the suspension of the bank, could have had his subscription cancelled upon the ground that the whole amount of the proposed increase of capital had not in fact been paid in, although according to the pleadings the contrary was certified by the Comptroller. But immediately upon the failure of the bank the rights of creditors attached under section 5151, and a shareholder who was such when the failure occurred could not escape the individual liability prescribed by that section upon the ground that the bank had issued to him a certificate of stock before, strictly speaking, it had authority to do so. We concur with the Circuit Court of Appeals in holding that under section 5142, as modified by the act of May 1st 1886, each subscription for portions of increased capital "when paid up in full becomes valid and binding until the maximum is reached, and the statute does not incorporate into such subscriptions a condition that the subscriber paying such subscription in full cannot become a holder of valid stock unless the maximum amount of the proposed increase is subscribed and paid for." If this be a sound view, as we think it is, it follows that one holding stock in a national bank which is so far valid as to entitle him to enjoy, and who is accorded the right to enjoy, the privileges of a shareholder, as against the bank, is a shareholder upon whom assessments may be made in conformity with section 5151.

The present suit is primarily in the interest of creditors of the bank. It is based upon a statute designed not only for their protection but to give confidence to all dealing with national banks in respect of their contracts, debts and engagements, as well as to stockholders generally. If the subscriber became a shareholder in consequence of frauds practised upon him by others, whether they be officers of the bank or officers of the Government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of section 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position.

Although this question has not arisen in any former case in the precise form in which it is here presented, the views we have expressed are in line with former adjudications.

In *Aspinwall* v. *Butler*, 133 *U. S.* 595, 607, 609, the principal question was as to the liability under section 5151 of one who had subscribed and paid for a part of an authorized increase of the stock of a national bank, the whole amount of such increase not having been taken up by subscriptions. Referring to a by-law of the association relating to the power of the directors when there was a deficiency in subscriptions arising from the failure of some to take stock who had the privilege of doing so, the court, speaking by Mr. Justice Bradley, said: "There was no express condition that the individual subscriptions should be void if the whole $500,000 was not subscribed; and, in our judgment, there was no implied condition in law to that effect. Each subscriber, by paying the amount of his subscription, thereby indicated that it was not made on any such condition. It is not like the case of creditors signing a composition deed to take a certain proportion of their claims in discharge of their debtor. The fixed amount of capital stock in business corporations often remains unfilled, both as to the number of shares subscribed, and as to payment of instalments; and the unsubscribed stock is issued from time to time as the exigencies of the company may require. The fact that some of the stock remains unsubscribed is not sufficient ground for a particular stockholder to withdraw his capital. There may be cases in which equity would interfere to protect subscribers to stock where a large and material deficiency in the amount of capital contemplated has occurred. But such cases would stand on their own circumstances. It could hardly be contended that the present case, in which more than ninety-two per cent. of the contemplated increase of capital was actually subscribed and paid in, would belong to that category. In *Minor* v. *Mechanics' Bank of Alexandria*, 1 *Pet.* 46, only $320,000 out of $500,000 of capital authorized by the charter was subscribed in good faith, but the court did not regard this deficiency in the subscriptions as at all affecting the status of the corporation, or the validity of its operations. Some reliance is placed upon the words of the act of Congress which authorizes an increase of capital within the maximum prescribed in the articles of association. They are found in section 5142 of the Revised Statutes, which declares that any banking association may, by its articles, provide for an increase of its capital from time to time, but adds, 'no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount,' &c. This clause would have been violated by an issue of $500,000 of new stock, when only $461,300 was paid in; but not by an issue of the exact amount that was paid in. The clause in question

was intended to secure the actual payment of the stock subscribed, and so as to prevent what is called watering of stock. In the present case the statute was strictly and honestly complied with. The argument of the defendant asks too much. It would apply to the original capital of a company as well as to an increase of capital. And will it do to say, after a company has been organized and gone into business, and dealt with the public, that its stockholders may withdraw their capital and be exempt from statutory liability to creditors, if they can show that the capital stock of the company was not all subscribed?" Again: "The stock was lawfully created, the defendant subscribed for the shares in question and paid for them, and received his certificate; and nothing was afterwards done by the directors, the Comptroller of the Currency, or the stockholders in meeting assembled, which they had not a perfect right to do. The defendant became a stockholder; he held the shares in question when the bank finally went into liquidation; and, of course, became liable under section 5151 of the Revised Statutes to pay an amount equal to the stock by him so held."

In *Pacific National Bank* v. *Eaton*, 141 *U. S.* 227, 233, 234, the court, again speaking by Mr. Justice Bradley, said: "The defendant in error was just as much bound by her subscription to the new stock as if the whole $500,000 had been subscribed and paid in. The only question to be considered, therefore, is whether the fact that the defendant in error did not call for and take her certificate of stock made any difference as to her status as a stockholder. We cannot see how it could make the slightest difference. Her actually going or sending to the bank and electing to take her share of the new stock, and paying for it in cash, and receiving a receipt for the same in the form above set forth, are acts which are fully equivalent to a subscription to the stock in writing, and the payment of money therefor. She then became a stockholder. She was properly entered as such on the stock book of the company, and her certificate of stock was made out ready for her when she should call for it. It was her certificate. She could have compelled its delivery had it been refused. Whether she called for it or not was a matter of no consequence whatever in reference to her rights and duties. The case is not like that of a deed for lands, which has no force, and is not a deed, and passes no estate, until it is delivered. In that case everything depends on the delivery. But with capital stock it is different. Without express regulation to the contrary, a person becomes a stockholder by subscribing for stock, paying the amount to the company or its proper officer, and being entered on the stock book as a stockholder. He may take out a certificate or not, as he sees fit. Millions of dollars of capital stock are held without any certificate; or, if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself,

nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself. An actual subscription is not necessary, There may be a virtual subscription, deducible from the acts and conduct of the party." To the same effect was *Thayer* v. *Butler*, 141 *U. S.* 234.

It is supposed that *Concord First National Bank* v. *Hawkins*, 174 *U. S.* 364, 372, is in opposition to the views herein expressed. We do not think so. In the case referred to it appeared that the bank, located at Concord, New Hampshire, purchased, for purposes of investment, one hundred shares of the stock of the Indianapolis National Bank, doing business at Indianapolis, Indiana, and after such purchase appeared upon the books of the latter bank as the owner and holder of the shares so purchased. The bank at Indianapolis suspended and was put into the hands of a receiver. The question presented was whether, in respect of the stock standing in its name, the bank in New Hampshire could be held as a shareholder in the other bank under section 5151. This court, following the decisions in prior cases, including *California Bank* v. *Kennedy*, 167 *U. S.* 362, 367, held that a national bank had no power or authority to invest its surplus funds in the stock of another national bank. It was also adjudged that in the case of such a purchase the purchasing bank could plead its want of power, and thereby protect itself against the liability imposed upon shareholders by section 5151. The court said: "If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to Congress to subject the stockholders and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank, as would have resulted from a lawful act. It is argued, on behalf of the receiver, that the object of the statute was to afford a speedy and effective remedy to the creditors of a failed bank, and that this object would be defeated in a great many cases if the Comptroller were obliged to inquire into the validity of all the contracts by which the registered shareholders acquired their respective shares. The force of this objection is not apparent. It is doubtless within the scope of the Comptroller's duty, when informed by the reports of the bank that such an investment has been made, to direct that it be at once disposed of, but the Comptroller's act in ordering an assessment, while conclusive as to the necessity for making it, involves no judgment by him as to the judicial rights of the parties to be affected. While he, of course, assumes that there are stockholders to respond to his order, it is not his function to inquire or determine what, if any, stockholders are exempted."

The difference between that case and the present one is apparent. In the case before us there was no want of power in the defendant to subscribe

for stock in the bank at Sedalia and to assume the position of a shareholder. An individual may become a shareholder in a national bank by his own voluntary act. He can, if he choose, so act as to be estopped from saying that he is not a shareholder and liable as such for the contracts, debts and engagements of the bank. But a national bank is without authority to use its funds for the purchase of the stock of another national bank merely for purposes of investment, and therefore, as held in the *Hawkins* case, it could not under such circumstances become a shareholder within the meaning of section 5151. Of the powers of a national bank under the statutes providing for their creation every one must take notice. Whether a national bank may not be deemed a shareholder, within the meaning of section 5151, if it holds shares of another bank as security for previous indebtedness, is a question suggested in former cases, but not decided, and upon which, in this case, no opinion need be expressed.

The judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.